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No. 2825

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corpora-
tion,

Plaintiff in Error,

VS.

COUNTY OF LINCOLN,

Defendant in Error.


Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

AUG - 5 1916

F. D. Monckton,
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Helena, Montana;

HON. W. H. POORMAN, Assistant Attorney Gen-
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MESSRS. LOGAN & CHILD, Kalispell, Montana,
and

HON. JAMES M. BLACKFORD, Libby, Montana,
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Error.

HON. CLARENCE H. GILBERT, of Portland,
Oregon, and

MESSRS. GUNN, RASCH & HALL, of Helena,
Montana,

Attorneys for Defendant and Plaintiff in
Error.

[2] *In the District Court of the United States in
and for the District of Montana.*

No. 395.

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Cor-
poration,

Defendants.

*Page-number appearing at foot of page of original certified Record.

BE IT REMEMBERED, that on the 17th day of June, 1914, a Transcript on Removal of the above-entitled cause from the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln, was duly filed herein, said Transcript on Removal being in the words and figures following, to wit:

[3] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Complaint.

The plaintiff in the above-entitled action complains of the defendants therein and for cause alleges:

1. That at all the times hereinafter mentioned the above-named plaintiff was, ever since has been and now is one of the duly created, organized and existing counties of the State of Montana, and as such has charge and control of the highways and bridges laid out, constructed and operated by the authority of the State of Montana within the boundaries of said county.

2. That at all the times hereinafter mentioned the above-named defendant, Coast Bridge Company,

was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

3. That at all the times hereinafter mentioned the above-named defendant, National Surety Company, was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of New York.

4. That on or about the 18th day of December, A. D. 1911, the above-named plaintiff and the defendant, Coast Bridge Company, entered into a contract in writing, by the terms of which the defendant, Coast Bridge Company, for and in consideration of the payment of certain sums of money, understood and agreed to construct across the Kootenai River at Rexford in said County of Lincoln, State of Montana, a steel bridge, and thereafter during the month [4] of February, 1912, the said plaintiff and defendant, Coast Bridge Company, made certain modifications of the specifications attached to and made a part of such contract, a copy of which contract, together with the changed and modified specifications thereunto annexed and made a part of the same is hereto annexed marked Exhibit "A" and made a part of this complaint.

5. That by the terms of such changed and altered specifications so as aforesaid made a part of said contract, said defendant, Coast Bridge Company, agreed that all piles to be used in the construction of said bridge should be driven with a hammer weighing not less than two thousand pounds and that the penetration under the last blow of such hammer fall-

ing twenty feet should not exceed one half inch and that if necessary such piles should be shod with steel or cast iron shoes and properly ringed at the top with wrought iron ring to prevent their splitting or brooming.

6. That on the 18th day of December, 1911, in consideration of the said contract above mentioned the said defendant, Coast Bridge Company, and the said defendant, National Surety Company, made, executed and delivered to the said County of Lincoln their obligation in writing in the penal sum of Thirty Thousand Dollars (\$30,000.00) lawful money of the United States conditioned to the effect that if the said Coast Bridge Company should faithfully and truly observe and comply with all the terms, conditions and provisions in said contract and the changed and altered plans and specifications mentioned and should well and truly and fully do and perform all matters and things by them undertaken to be performed under said contract then and in such event such obligation should be null and void but that otherwise it was to be and remain in full force and effect, a copy of which obligation is hereto annexed marked Exhibit "B" and made a part hereof.

7. That during the course of construction of said bridge, as hereinafter set forth, this plaintiff, at various times and in various sums, paid to the said defendant, Coast Bridge Company, the [5] aggregate sum of Thirty Thousand Dollars (\$30,000.00) for and in consideration of the construction of the said bridge according to the terms and conditions of said contract and specifications thereto annexed; that

said payment was made without knowledge on the part of said plaintiff County or any of its officers or agents of the wrongs or injuries hereinafter mentioned and without any knowledge on the part of the plaintiff, its officers or agents that said bridge was not being constructed in accordance with the said contract and the plans and specifications mentioned and that the failure on the part of said defendant, Coast Bridge Company, to construct the said bridge in accordance with such contract and specifications, as hereinafter set forth, was a fact wholly and exclusively within the knowledge of the said defendant, Coast Bridge Company, and that the plaintiff, its officers and agents, had no knowledge or means of knowledge of such failure on the part of said defendant Coast Bridge Company and that the payments herein mentioned and each of them were all made under the belief of the plaintiff, its officers and agents, that said bridge was being constructed and was constructed strictly in accordance with the terms and conditions of said contract and specifications and that this plaintiff, its officers and agents, had no knowledge or means of knowledge to the contrary until long after each and every payment had been made and until after said bridge was destroyed as hereinafter set forth, and that this plaintiff could not by the exercise of reasonable or any diligence have discovered or known of the defective construction of said bridge as hereinafter set forth until after each and all of said payments had been made and until after said bridge was destroyed as hereinafter set forth, and that the said defendant, Coast Bridge

Company, at the time of receiving the payments hereinbefore mentioned and each and all of them wrongfully, willfully and with the intent to deceive, injure and defraud the plaintiff pretended that such bridge was constructed in accordance with said contract and specifications and this [6] plaintiff wholly relying upon such false and fraudulent representations and not otherwise, and believing that said bridge was being constructed and was constructed in compliance with the terms and conditions of said contract and specifications, made such payments and the whole thereof and did not until long afterwards discover that the defendant, Coast Bridge Company, had wholly failed and neglected to comply with the terms and conditions of said contract and specifications as hereinafter set forth.

That said contract and specifications hereinbefore mentioned provided for the driving of a set of piling for the middle pier of said bridge with a hammer weighing not less than two thousand pounds, falling twenty feet so that the penetration at the last blow would not exceed one half inch; but that the said defendant Coast Bridge Company, failed and neglected to drive said piling with a hammer weighing not less than two thousand pounds falling twenty feet so that the penetration at the last blow did not exceed one-half inch but on the contrary thereof said defendant, Coast Bridge Company so drove such piling that at the last blow thereof each and every one of such piling would have been driven at least six inches with a hammer weighing two thousand pounds and falling twenty feet and by reason of the failure and neglect of the said defendant, Coast

Bridge Company to drive said piling in accordance with the terms of such specifications, the foundation of such middle pier became and was at all times insecure and unsafe and by reason of the bottoms of such piling resting on insecure and shifting gravel and sand occasioned by the defendant, Coast Bridge Company, failing to drive such piling in accordance with the specifications hereinbefore mentioned the foundation of said middle pier was placed in great danger of being undermined and destroyed, and thereafter and during the spring of 1913, by reason of the failure and neglect of the said defendant, Coast Bridge Company, as aforesaid, said center pier was washed away, toppled over and destroyed and the entire bridge structure resting thereon entirely collapsed and was rendered useless [7] and of no value to the damage of the County of Lincoln in the sum of Thirty Thousand Dollars (\$30,000.00).

8. That no part of said sum mentioned in the preceding paragraph has been paid.

WHEREFORE, plaintiff prays that it recover of and from the said defendants and each of them the sum of Thirty Thousand Dollars (\$30,000.00), its damages so as aforesaid sustained, and for its costs of suit.

D. M. KELLY,

Atty. Gen.,

JAMES M. BLACKFORD,

County Attorney,

C. S. WAGNER,

Asst. Atty. Gen., and

SIDNEY M. LOGAN,

Attorneys for Plaintiff.

[8] Exhibit "A" to Complaint—Contract.**CONTRACT.**

This agreement, made the fifth day of February, one thousand nine hundred and twelve, between the Coast Bridge Company, a corporation, hereinafter known as the Bridge Company, party of the first part, and the County of Lincoln, Montana, hereinafter known as the County, party of the second part, WITNESSETH:

That, Whereas the said parties executed a contract on December 18, 1911, for the construction of a steel bridge at Rexford, Montana, by the Bridge Company for the County, and

Whereas, authorized by a provision of said contract, the County has decided to alter the dimensions of said Bridge and increase its length, which necessitates alterations in the construction of said Bridge, the said parties do now covenant, promise and agree one with the other as follows, to wit:

The Bridge Company promises and agrees to alter and extend the bridge aforesaid, and to make all alterations, extensions and enlargements, and to erect and to construct the said bridge in accordance with plans, drawings and specifications to be hereinafter submitted by the Bridge Company to the County, and which said plans, drawings and specifications shall become, upon acceptance by the County, a part of said contract of December 18, 1911, and shall be annexed thereto and marked "Plans for Rexford Bridge," and shall be submitted for the plans,

drawings and specifications heretofore made a part of the contract of date December 18, 1911.

It is covenanted and agreed by the Bridge Company and the County that this contract shall become operative and effective upon the submission of the plans, drawings and specifications herein first mentioned to the County and the approval and acceptance of the same by the County and not before.

The County, for and in consideration of the strict performance by the Bridge Company of all the aforesaid covenants [9] by it to be performed, hereby promises and agrees to pay the Bridge Company the sum of Three thousand four hundred and eighty-seven Dollars, in addition the price agreed upon for the said Bridge in the said contract of date December 18, 1911, payment of said money to be made within thirty days after the acceptance of said Bridge by the County.

In Witness Whereof the said County of Lincoln, State of Montana, has caused these presents to be signed in its name and behalf by the Board of County Commissioners of said County, and attested by the County Clerk, and the said Coast Bridge Company has caused these presents to be signed in its name and behalf by the President and its Secretary the day

and year herein first above written.

LINCOLN COUNTY, Montana.

PAUL D. PRATT, Chairman,

(County Seal) Board of County Commissioners.

J. P. BARTLETT, Commissioner.

F. P. GAREY, Commissioner.

COAST BRIDGE COMPANY,

By JOHN P. WHITLOCK, President.

GEO. A. SEARS, Secretary.

Attested by: SAMUEL CARPENTER,
County Clerk.

[10] SPECIFICATIONS.

For a Steel Highway Bridge and Approaches
Over the Kootenai River

Near Rexford

Lincoln County, Montana.

Specifications referred to in Supplemental Contract of date Feb. 5, 1912, for a Bridge at Rexford, Montana, being an alteration of plans specified in contract of December 18, 1911, for Bridge at Rexford, Montana, between Lincoln County, Montana, and Coast Bridge Co.

PAUL D. PRATT,
Chairman Co. Comms.

Approved Feb. 5, 1912.

PAUL D. PRATT,
Chairman.

[11] SPECIFICATIONS

GENERAL DESCRIPTION.

The work covered by these specifications and accompanying plans contemplate the manufacture and erection of a steel highway bridge on steel tubular

piers and concrete piers over the Kootenai river near Rexford, Lincoln County, Montana.

ACCOMPANYING PLANS.

The accompanying plans show one general design for the crossing of the Kootenai river at Rexford, Montana, and will be known as plan "A."

PLAN "A."

SHEET 1.

Sheet 1 shows the profile of the Kootenai river near Rexford, Montana, at the proposed site of the bridge.

The proposed crossing shown on this sheet suggests 2-220' Pin conn. spans for a superstructure, resting on one stream pier and two shore piers, together with the necessary wooden approaches.

On this sheet is also shown the detail dimensions for the concrete piers, and tubular piers; also a cross section of the pile approach.

SHEET 2.

Sheet 2 shows the strain sheet and the sizes and make ups of all of the members of the steel work of a 220' pin conn. type of span suggested for the two spans of this crossing.

[12] There is also shown a cross section of the Span at the center, and an end view of the span showing the sizes and arrangements of the wind or lateral bracing.

This cross section also shows the clearances and the arrangement and sizes of the floor system and rail.

DRAWINGS.

These specifications and the accompanying draw-

ings are intended to describe and provide for the completed work. They are to be co-operative, and what is called for by either is as binding as if called for by both.

The work therewith described is to be completed in every detail, notwithstanding that every item involved is not particularly mentioned.

The contract price as set forth in the proposal is based on the intent of these specifications, and the accompanying plans, and a copy of same will be attached and be considered part of the specifications and accompanying plans.

FLOOR SYSTEM.

The floor stringers underneath the roadway on the approaches and spans shall consist of ten lines of 3"x14" joists except where the panel length exceeds 20', when the joists shall be increased in size to 4"x16". These joists shall be of such length that they shall overlap the floor beam and caps at least 6". They shall preferably be surfaced one edge to even width, and if not they shall be dapped over the floor beams 1/2" to give an even *boaring*. The outside joists shall make butt joint so as to be in perfect alignment for the bolting of the hand rail posts. There shall be a line of 2x6 bridging at center of each panel both on spans and approaches. The floor shall consist of 3"x12" plank, 18" long, laid tight and neatly trimmed to even length. They shall preferably be surfaced one side to even thickness and laid with the smooth side down. Each plank shall be spiked with one 7" wire spike at each intersection of

the intermediate joist [13] and by two 7" spikes to the outside joists.

RAIL AND CARDS.

On each side of the roadway of the span and approaches there shall be a 4x6 wheel guard fastened through and into the outside line of joists by a 5/8"x12" lag screw, having a malleable washer under head. These lag screws shall be spaced about 6' apart.

There shall be a wooden hand rail on both sides of the roadway extending from end to end of bridge and approaches, and consisting of two lines of 2x6, and one line of 3x10, sufficiently spiked to 4x6 posts, which in turn are to be bolted by 2 1/2" bolts with malleable washers underhead, and nut, to the outside joists. There shall be three posts to each panel of floor system, or they shall be spaced about 6' center to center. Along the center of the roadway there shall be a 6x8 guard timber dividing the roadway into two parts. This guard shall be bolted through the floor to timber washers underneath, with 1 1/2" bolts. This line of guard timber shall extend from end to end of the steel work and as far on the approaches as may be necessary, to keep the travel on the right side of the bridge in crossing. All guard rail, hand rail posts and hand rail shall be surfaced four sides. Hand rail posts shall be cut of such length that the height of the hand rail above the finished floor shall be at least 3' 6". After completion of the hand rail, posts and stringers of the same shall receive two good coats of paint, of a color which may be selected later.

APPROACHES.

The wooden approaches to the spans shall rest on pile bents. These bents shall consist of four piles spaced transversely, 5' 6" center to center. They shall be capped with a 10x12", 20' cap, drift bolted to each pile with a $\frac{3}{4}$ x28" round drift bolt. Each bent shall be swayed with two $\frac{3}{8}$ " sways bolted to the cap and to each pile with a $\frac{5}{8}$ " machine bolt. All bolts shall have the proper malleable washers underhead, and nut.

[14] All approaches to span shall be of such length as the local engineer may designate, but no approach shall have a grade greater than five per cent. On the approaches on the hill side of the Libby and Troy bridges there shall be wider approaches, so as to make an easy turn from the approaches to the new road grade. These approaches shall have the piles and caps and joists called for on the accompanying plans.

**SPECIFICATIONS FOR MATERIAL.
CEMENT.**

All cement used shall be one of the standard brands of Portland cement, and must be of such quality as to pass the test adopted as standard by the American Society of Civil Engineers.

SAND.

The sand shall be coarse, clean and sharp and must be free from loam, earth or other foreign matter of any kind, in excess of five per cent by volume.

GRAVEL.

The gravel used in the concrete for the abutments,

piers and for filling the tubes, shall be thoroughly cleaned from dust, earth or other objectionable matter, and shall vary in size from $\frac{3}{8}$ " to 2" in greatest diameter.

CONCRETE.

Concrete shall be of the following proportions: To each barrel or four bags of cement shall be 12 cubic feet of sand and 22 cubic feet of gravel of the quality given above. Concrete shall preferably be machine mixed, but if mixed by hand the following method shall be employed. It shall be mixed on a close board platform. The material for each batch must be carefully measured to insure the correct proportions. The sand and cement shall be evenly spread and then thoroughly mixed by turning over with hoes or shovels before wetting; they should be then wetted and worked to a soft mortar; then the proper amount previously drenched with water, should be spread over the mortar and well incorporated with same by turning the whole over at least three times with *shovel* [15] *hoes*. It should be of the consistency known as wet concrete, and require but little ramming in the forms when laid in layers not thicker than nine inches.

LUMBER.

All lumber used shall be native lumber, sound, reasonably well seasoned, free from loose or rotten knots, wind shakes, splits or other defects that would impair its strength or durability. All lumber for the hand rail and guards shall be surfaced four sides.

PAINT.

All paint used in this work in shop or field shall be

one of the standard brands of graphite, mixed with pure linseed oil.

PILES.

Piles are to be cut from live trees, and not to be less than 12" at the large end and not less than 9" at the small end. They shall be stripped from all bark; be straight and sound and free from wind shakes. If found necessary in driving, all piles shall be shod with steel or cast iron shoes to prevent their splitting or crushing under rapid blows of the hammer.

HARDWARE.

All hardware shall be first class in every respect and of standard sizes and make, and shall be used as called for on the plans in these specifications.

STEEL WORK.

All steel work shall be as per the standard specifications, and shall conform to the requirements of the standard specifications of the American Bridge Company of New York.

COAST BRIDGE COMPANY.

SPECIFICATIONS FOR MATERIAL AND DETAILS FOR THE MANUFACTURE OF STEEL HIGHWAY BRIDGES.

SPECIFICATIONS FOR MATERIAL.

STEEL.

All steel used in the construction of these bridges shall conform to the manufacturer's standard specifications for medium [16] and rivet steel, as published in the 1903 Hand Book of the Carnegie Steel Company.

PROPORTIONS OF PARTS.

All parts of the structure shall be proportioned by the following unit strains:

Lateral bracing per square inch.....18,000 lbs.

Bottom *fange* of riveted girders, net section.....14,000 “

Solid rolled beams, used as floor beams or stringers.....16,000 lbs.

Floor beam hangers..... 8,000 “

Counters and long verticals, forged bars..12,000 “

Counters and long verticals, plates and shapes.....11,000 “

Bottom chords and main diagonals, eye bars.....15,000 “

Bottom chords and main diagonals, plates and shapes.....14,000 “

Shear on web plates of girders..... 8,000 “

Shear on pins and rivets.....10,000 “

Bending on pins.....25,000 “

Bearing projected and semi-intrades.....16,000 “

For rivets in floor system, deduct 20% from the above unit strains.

For rivets in lateral system, add 20% to above unit strains.

For rivets hand-driven or bolts used in field erection, add 25% to the number obtained as above.

In members subject to tension strains, full allowance shall be made for reduction of section by rivet holes.

Compression members shall be proportioned by the following allowed unit strains:

Square Ends.	Pin and Square Ends.	Pin Ends.
12,500	12,500	12,500
<hr/>	<hr/>	<hr/>
2	2	2
(L)	(L)	(L)
1-	1-	1-
<hr/>	<hr/>	<hr/>
2	2	2
36,000R	24,000R	18,000R

where L equals the length of the member in inches and where R equals the least radius of gyration of the member.

[17] STEEL ROLLERS.

Shall be proportioned by the formula $600-d$ for allowed unit strains per lineal inch of rollers, where d is the diameter of the rollers in inches.

LATERAL STRUTS.

Lateral struts shall be proportioned by the above formula to resist the resultant due to an assumed initial strain of 10,000 lbs. per square inch upon all the rods attaching to them assumed to be produced by adjusting the bridge, or to greatest strain from wind in one direction.

LENGTH.

No compression member shall have a length exceeding sixty times its least width, nor 120 times its least radius of gyration for main members nor 150 times its least radius of gyration for bracing.

FLANGES.

In riveted beams and plate girders the compression flange shall be made of the same gross section as the tension flanges.

Rolled beams shall have generally a depth of not

less than $1/15$ of the span.

ALTERNATE STRAINS.

Members subject to alternate strains of tension and compression shall be proportioned to resist each kind of strain. Both of the strains, however, to be considered as increased by an amount equal to $8/10$ of the least radius of the two strains for determining the sectional areas by the above allowed unit strains.

DETAIL OF CONSTRUCTION.

DETAILS.

All the connections and details of the several parts of the structure shall be of such strength, that upon testing, pressure will occur in the body of the members rather than in any of their details or connections.

Preference shall be had for such details as shall be most accessible for inspection, cleaning and painting; no closed sections will be allowed.

[18] The pitch of rivets in all classes of work shall never exceed 6 inches, or sixteen times the thinnest outside plate, nor be less than three diameters of the rivet.

The rivets used shall generally be $5/8$, $3/4$, and $7/8$ inch diameter.

The distance between the edge of any piece and the center of a rivet hole must never be less than one inch, except for bars less than 2 inches wide; when practicable, it shall be at least two diameters of the rivet.

For punching, the diameter of the die shall in no case exceed the diameter of the punch by more than

1/16 of an inch, and all holes must be clean cut without torn or ragged edges.

All rivet holes must be accurately spaced and punched so that when the several parts forming one member are assembled together, a rivet 1/16 of an inch less diameter than the hole can generally be entered hot, into any hole, without reaming or straining the metal by “drifts”; occasional variations must be corrected by reaming.

The rivets when driven must completely fill the holes. The rivet-heads must be round and of uniform size for the same sized rivets thruout the work. They must be full and neatly made, and be concentric to the rivet hole and thoroughly pinch the connected pieces together.

Wherever possible, all rivets must be machine driven. The machine must be capable of straining the applied pressure after the upsetting is completed.

Field riveting must be reduced to a minimum or entirely avoided where possible.

The effective diameter of a driven rivet will be assumed the same as its diameter before driving. In deducting the rivet holes to obtain net sections in tension members, the diameter of the rivet holes will be assumed as $\frac{1}{8}$ inch larger than the undriven rivets.

For main members and their connections, no material shall be [19] used of a less thickness than $\frac{1}{4}$ of an inch; and for laterals and their connections, no material less than $\frac{3}{16}$ of an inch in thickness; except for lining or filling vacant spaces.

The heads of eye bars shall be so proportioned and

made that the bars will preferably break in the body of the original bar rather than at any part of the head or the neck. All bars 3" in width or more shall be die forged.

The bars must be free from flaws and of full thickness in the necks. They shall be perfectly straight before boring. The holes shall be in the center of the head, and on the center line of the bar.

The bars must be bored to length not varying from the calculated lengths more than $1/64$ of an inch for each 25 feet of total length.

The lower chord shall be packed as narrow as possible.

The pins shall be turned straight and smooth; chord pins shall fit the pinholes within $1/32$ of an inch.

All bars with screw ends shall be upset at the ends, so that the diameter at the bottom of the threads shall be $1/16$ inch larger than any part of the body of the bar. Where closed sleeve nuts are used on adjustable members, the effective length of the thread shall be legibly stamped at the screw ends of each bar.

All threads must be United States standard, except at the ends of the pins.

The pitch of rivets at the ends of compression members shall not exceed four diameters of the rivets for a length equal to twice the width of the member.

The open sides of all compression members shall be stayed by batten plates at the ends and diagonal lattice work at intermediate points.

All bed plates must be of such dimensions that the greatest pressure upon the pedestal stone shall not exceed 250 lbs. per square inch.

All bridges over 100 feet span, shall have turned friction [20] rollers running between planed surfaces. These rollers shall not be less than $2\frac{7}{8}$ inches diameter for spans 100 feet, and for greater spans, this diameter shall be increased in proportion of one inch for 100 feet additional. Bridges 100 feet and less in length, one end shall be free to move on smooth surfaces. Allowance should be made for an expansion and contraction corresponding to a variation of 150° Fahrenheit, in temperature.

SHOP PAINTING.

All iron work before leaving the shop shall be thoroughly cleaned from all loose scale and rust, and be given one good coating of graphite paint, well worked into all joints and open spaces.

In riveting work, the surfaces coming in contact shall each be painted before being riveted together.

Pieces which are not accessible for painting after erection shall have two good coats of paint.

The paint shall be of good quality of graphite mixed with pure linseed oil, or such as may be specified in the contract.

Pins, pin holes, screw threads and other finished surfaces shall be coated with white lead and tallow before being shipped from shop.

PAINTING.

After the erection of the steel work and before any lumber has been placed on the bridge, all steel work

shall be given one complete coat of same kind of paint as was used in the shop.

FINAL.

All work either described or shown herein shall be executed of good material and in good workmanlike manner and same shall be acceptable to the Board of County Commissioners of Lincoln County, Montana, or their duly authorized representatives.

[21] EXCAVATION.

FOR PIERS AND ABUTMENTS.

The Piers and Abutments shall be sunk to the elevation called for on the plans. These shall be made within a timber cofferdam, or by any other means which the contractor may see fit to use in order to reach the desired depth and to conform to the dimensions shown on the plans of these foundations.

After excavation is made to the full depth, piles shall be driven inside, if so ordered by the Engineer. They shall be cut off at an elevation of about 24" above the bottom of the concrete piers and abutments, and about 6" above the bottom of the steel work if tubular piers are used. These foundations shall then be pumped out and filled with concrete, as specified under concrete.

If steel tubes are used, the upper foot of the top of the tubes shall be made of concrete in the proportion of one, two and four.

All bed plates resting upon the concrete work shall be set on small metal wedges, leveled to the proper elevation and thoroughly grouted with cement mortar in the proportion of one of cement to two of sand, in order that they may have an even bearing throughout.

FORMS.

The concrete of the piers and abutments shall be cast within suitable molds. These molds shall be built of lumber, sized to an even thickness and width and finished on the interior in a workmanlike manner, in order to give good finish to the completed concrete. These molds or forms shall be of such size and dimensions that the concrete piers and abutments shall conform to the sizes and dimensions shown on the accompanying plans.

All forms shall be built of good sound lumber and shall be properly braced and tied together by wire ties, in order that there may be no spreading when the concrete is poured. These forms shall not be removed until at least five days after the concrete has been pressed.

[22] ERECTION.**PILE DRIVING.**

All piles shall be as called for under specifications and shall be of the length called for on the plans or of a length necessary to fulfill the following specification as to driving;

Piles shall be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one half inch. If necessary they shall be shod with steel or cast iron shoes and properly ringed at the top with a wrought iron ring, to prevent their splitting or brooming. All piles which are broken, split or badly broomed and in the opinion of the engineer are not satisfactory, must be withdrawn and replaced by other piles to the satisfaction of the

engineer or inspector in charge.

STEEL SPANS.

The contractor shall furnish all staging and false work, shall erect and adjust all metal work, place all posts, chords, struts, stringers, floor planks, guards and rail complete as shown on plans and specifications. He shall anchor the spans with proper anchor bolts; fox-bolted to the concrete and set with Portland cement.

Such false work shall be used as in the opinion of the engineer shall permit of no unnecessary risk of accident to the men and material. After the span has been swung and before the floor has been placed, all work shall be thoroughly and evenly painted with one additional coat of paint; as was used in the shop. All recesses which will retain water or through which water can enter, must be filled with thick paint or some water-proof cement.

FIELD RIVETS.

All riveted field connections must be made in the best possible manner. The heads shall be similar to those shown in shop driven rivets. The rivets must be heated uniformly the entire length and when driven they must completely fill the holes. While a workmanlike finish is desired, it must be remembered that the [23] item of prime importance is that the rivet shall be well set up the entire length of the hole. Rivets with cracked heads or heads not concentric with the axis of holes will not be admitted. All rivet heads and marred surfaces must be touched up with paint before any rust has had time to form or field coat of paint is applied.

Exhibit "B" to Complaint—Bond, December 20, 1911, Bridge Co. et al., to County of Lincoln.

[24] BOND FOR REXFORD BRIDGE.

KNOW ALL MEN BY THESE PRESENTS: That we, the Coast Bridge Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, as Principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact a Surety business in the State of Montana, as Surety, are held and firmly bound unto the County of Lincoln, Montana, constituting its Board of County Commissioners, in the penal sum of Thirty thousand (\$30,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, That, WHEREAS, on the 18th day of December, 1911, the said Coast Bridge Company, the Principal herein, made and entered into a certain contract with the County of Lincoln, Montana, by the terms, conditions and provisions of which the said COAST BRIDGE COMPANY, the Principal herein, is to and shall furnish all labor and material and do certain work, to wit: for the erection complete of a two span riveted bridge over the Kootenai river at Rexford, Montana, together with three concrete piers; also the lumber and railings for said

spans and all other material, all strictly in accordance with the maps, plans and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof.

WHEREAS, the Board of County Commissioners of Lincoln County, Montana, have since the 18th day of December, 1911, changed and altered the original plans and specifications of the details for the erection of said bridge at Rexford, Montana, and the Coast Bridge Company, the Principal herein, has made and entered into a new contract with the County of Lincoln, Montana, in accordance with the changed plans and specifications and by the terms, conditions and [25] provisions of which the said Coast Bridge Company, the Principal herein, is to and shall furnish all labor and material and do certain work, to wit: For the erection complete of a two span riveted bridge over the Kootenai river at Rexford, Montana, together with three concrete piers; also the lumber and railings for said spans and all other material, all strictly in accordance with the amended and changed maps, plans and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof.

WHEREAS, the Board of County Commissioners have by an order duly made, ordered that the Coast Bridge Company file a new bond and undertaking in the sum of THIRTY THOUSAND DOLLARS (\$30,000.00), conditioned for the faithful performance by the said Coast Bridge Company, of all the conditions of that certain contract entered into by and between the Coast Bridge Company and Lincoln

County, Montana, in accordance with the amended plans and specifications, and that the bond heretofore furnished by the Coast Bridge Company shall be null and void and of no force or effect after the filing of the within obligation.

NOW, THEREFORE, if the said COAST BRIDGE COMPANY, the Principal herein, shall faithfully and truly observe and comply with all the terms, conditions and provisions in said contract, and the changed and altered plans and specifications mentioned, and shall well and truly and fully do and perform all matters and things by them undertaken to be performed under said contract, and shall pay all laborers, mechanics or sub-contractors with material, supplies or provisions for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work, then this obligation shall be null and void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said Principal has caused these presents to be signed by its duly authorized officers, and the said Surety has caused these presents to be signed by its duly [26] authorized Resident Vice-President and Resident Assistant Secretary, and its corporate seal to be hereto

attached this 20th day of December, 1911.

COAST BRIDGE COMPANY.

By JOHN P. WHITLOCK,
Its President.

(Coast Bridge Co. Seal)

GEO. A. SEARS,
Secty.

NATIONAL SURETY COMPANY.

By HARRISON ALLEN,
Resident Vice-President.

(National Surety Co. Seal)

Attest: JAS. Mc. WOOD,
Resident Assistant Secretary.

Approved Sept. 9th, 1912.

PAUL D. PRATT,
Chairman.

Recorded at the request of County Commissioners,
Sept. 9th, 1912.

SAMUEL CARPENTER,
County Recorder.

[Endorsed]: Title of Court and Cause. Com-
plaint. Filed April 25, 1914. Timothy Miller,
Clerk of Court.

[27] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Summons.

The State of Montana Sends Greetings to the Above-named Defendants and to Each of Them:

You are hereby summoned to answer the complaint in this action, which is filed in the office of the clerk of this court, a copy of which is herewith served upon one of you in each county wherein any of you reside, and to file your answer and serve a copy thereof upon the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you, by default, for the relief demanded in the complaint.

Witness my hand and the seal of said court this 25th day of April, 1914.

[Seal]

TIMOTHY MILLER,

Clerk.

State of Montana,
County of Lewis and Clark,—ss.

OFFICE OF THE SHERIFF.

I hereby certify that I have received the within summons on the 30th day of April, 1914, and personally served the same on the 1st day of May, 1914, upon National Surety Company, a corporation, one of the within named defendants, by delivering to William K. Armstrong, State Manager of said National Surety Company, [28] a corporation, personally, in the County of Lewis and Clark, a copy of said Summons, and a copy of the complaint referred to in said Summons.

Dated Helena, Montana, June 6, 1914.

ROLLA DUNCAN,
Sheriff.

By C. E. Deflette,
Deputy Sheriff.

Service	\$1.00
Mileage20

Total	\$1.20
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Filed June 12, 1914. Timothy Miller, Clerk.

[29] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Separate Demurrer of Defendant National Surety Company.

Now comes the National Surety Company, one of the defendants in said above-entitled cause, and appearing separately for and on its own behalf, demurs to the plaintiff's complaint on file herein upon the following grounds:

I.

That said plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

GUNN, RASCH & HALL,
Attorneys for Defendant National Surety Company.

Due personal service of within demurrer made and admitted and receipt of copy acknowledged this 18th day of May, 1914.

D. M. KELLY,
Atty. Genl.,

By C. S. WAGNER,
Asst.,

Of Attorneys for Plaintiff.

Filed May 21, 1914. Timothy Miller, Clerk.

[30] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

**Notice of Intention to File Petition for Removal and
Bond on Removal.**

To the County of Lincoln, the Plaintiff in said Above-entitled Cause, and to Messrs. D. M. Kelly, Attorney General of the State of Montana, C. S. Wagner, Assistant Attorney General of the State of Montana, James Blackford, County Attorney of the County of Lincoln, and Sidney M. Logan, said Plaintiff's Attorneys:

You and each of you will please take notice that the National Surety Company, one of the defendants in said above-entitled action, intends to file and will file its petition in said above-entitled court for removal of said cause to the District Court of the United States for the District of Montana, on the 21st day of May, 1914.

And you are further notified that the said National Surety Company intends to file and will file a good and sufficient bond in connection with and at the time of filing such petition for removal, a copy

of which said petition for removal and of said bond are herewith separately served upon you.

Dated this 18th day of May, 1914.

GUNN, RASCH & HALL,
Attorneys for Defendant National Surety Company.

[31] Due personal service of within notice made and admitted and receipt of copy acknowledged this 18th day of May, 1914, and service and receipt of copy of said petition for removal and of copy of said bond on removal is also hereby acknowledged and admitted.

D. M. KELLY,
Atty. Genl.
By C. S. WAGNER,
Asst.,
Of Attorneys for Plaintiff.

Filed May 21, 1914. Timothy Miller, Clerk.

[32] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That the National Surety Company, a corporation,

organized and existing under and by virtue of the laws of the State of New York, one of the defendants in said above-entitled cause, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to do a surety business in the State of Montana, as surety, are held and firmly bound unto the County of Lincoln, the above-named plaintiff, in the penal sum of Three Hundred Dollars (\$300), for the payment of which well and truly to be made to said County of Lincoln, plaintiff in said above-entitled cause, we bind ourselves, our representatives, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 18th day of May, 1914.

The condition of the above obligation is such that, whereas the National Surety Company, one of the defendants in said above-entitled cause, is about to petition the District Court of the Eleventh Judicial District of the State of Montana, in and for [33] the County of Lincoln, for the removal of said above-entitled action, wherein the said County of Lincoln is plaintiff and the Coast Bridge Company, a corporation, and said National Surety Company, are defendants, to the District Court of the United States for the District of Montana;

NOW, if the said National Surety Company shall enter in the District Court of the United States for the District of Montana, within thirty days from the day of the filing of this petition for removal a certified copy of the record in this action, and shall well and truly pay all costs that may be awarded by

the said District Court of the United States in and for the District of Montana, if said United States District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force, virtue and effect.

In Witness Whereof, the National Surety Company has caused these presents to be executed as the principal thereof by its agent thereunto duly authorized, and its corporate seal to be affixed hereto, and said United States Fidelity & Guaranty Company has caused these presents to be executed as surety by its agent thereunto duly authorized and its corporate seal to be affixed hereto on this 18th day of May, A. D. 1914.

NATIONAL SURETY COMPANY.

By W. K. ARMSTRONG,

Its Attorney in Fact.

[National Surety Co. Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By CLINTON O. PRICE,

Its Attorney in Fact.

[United States Fidelity & Guaranty Co. Seal]

[34] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Petition for Removal.

To the Honorable The District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln:

The petition of the National Surety Company, one of the defendants in said above-entitled cause, respectfully shows and represents to this Honorable Court:

1. That your petitioner is one of the defendants in said above-entitled cause, and that the said action has been commenced against your petitioner and its said codefendant; Coast Bridge Company, by the said plaintiff, the County of Lincoln, in said above-entitled court, and the said action is now pending therein for the recovery in favor of said plaintiff and against said defendants of the sum of \$30,000 damages and the costs of the action, upon a bond executed by your petitioner's codefendant, Coast Bridge Company, as principal, and by your petitioner as surety, which said bond is in the sum of \$30,000 and was given to said plaintiff, the County

of Lincoln, for the faithful performance on the part of your petitioner's said codefendant, Coast Bridge Company, of a certain contract made and entered into by and between said plaintiff and said defendant, Coast Bridge Company, for the [35] construction and erection by said defendant, Coast Bridge Company, of a bridge over the Kootenai River at Rexford, Montana, and it being alleged in said plaintiff's complaint that the said defendant, Coast Bridge Company, failed to erect and construct said bridge in accordance with, and as required by, said contract, by reason of which such alleged failure on the part of the said defendant, Coast Bridge Company, to perform said contract in accordance with its terms and provisions, the said bridge was destroyed to plaintiff's damage in the sum of \$30,000, all of which is more fully shown and set forth in plaintiff's complaint on file herein, to which reference is hereby made.

2. That your petitioner disputes the claim made by said plaintiff and denies any and all liability to said plaintiff on account of the destruction of said bridge.

3. That the said action is and involves a controversy wholly between citizens of different states. That the said action was begun against your petitioner and its said codefendant, Coast Bridge Company, in said above-entitled court on the 25th day of April, 1914. That when said action was commenced, the said plaintiff was, ever since has been, and it is now a county of the State of Montana, created, organized and existing as a body corporate

and politic under and by virtue of the laws of the State of Montana, and during all of said times was a citizen of the State of Montana, and was not at any of said times a citizen of any other State of the United States of America. That this petitioning defendant, National Surety Company, at the time of the commencement of this action was, ever since has been, and it is now a corporation duly organized and existing under and by virtue of the laws of the State of New York, and at all of said times was and now is a citizen of said State of New York. That your petitioner's said [36] codefendant, Coast Bridge Company, at the time of the commencement of this action was, ever since has been, and it is now a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and at all of said times was and is now a citizen of said State of Oregon, and that both of said defendant corporations, your petitioner and its said codefendant, Coast Bridge Company, at all of said times were and they are now citizens of states of the United States other than the State of Montana.

4. That the said action is of a civil nature and the matter and amount in dispute therein between the said plaintiff on the one side and the said defendants on the other, exceeds, exclusive of interest and costs, the sum of \$3,000, and it is a cause removable to the United States District Court for the District of Montana, by virtue of the provisions of the statutes of said United States, upon the ground of the diversity of citizenship of the said plaintiff on the one side and the said defendants on the other side.

5. That your petitioner was served with summons in said action in the City of Helena, Lewis & Clark County, Montana, on the 1st day of May, 1914, and the time within which your petitioner is required to appear in said action has not yet expired. That no service of process or summons has been made or had upon your petitioner's said codefendant, Coast Bridge Company, and the said defendant, Coast Bridge Company, has in no wise appeared in said action, nor has it caused any appearance on its behalf to be made in said cause, and this court has not acquired jurisdiction of the said defendant, Coast Bridge Company.

6. That your petitioner herewith presents a good and sufficient bond as provided and required by the statute in such case made and provided, that it will enter in the District Court of the United States in and for the District of Montana [37] within thirty days from the date of the filing of this petition for removal, a certified copy of the record of this action, and for the payment of all costs that may be awarded by the said District Court of the United States for the District of Montana, if said District Court of the United States shall hold that the said above-entitled cause was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this action be removed to the District Court of the United States in and for the District of Montana, and that this Honorable Court accept this petition and the said bond and proceed no further in said cause, except to make an order for the removal of said cause to the

said District Court of the United States for the District of Montana.

NATIONAL SURETY COMPANY.

By GUNN, RASCH & HALL,

Its Attorneys thereunto duly authorized.

GUNN, RASCH & HALL,

Attorneys for Petitioner.

State of Montana,

County of Lewis & Clark,—ss.

Carl Rasch, being first duly sworn, deposes and says: That he is one of the attorneys for the National Surety Company, one of the defendants in said above-entitled cause and the petitioner named in the foregoing petition for the removal of said cause to the Federal Court; that affiant has read the foregoing petition and knows the contents thereof and that the matters and things therein stated and set forth are true to the best of affiant's knowledge, information and belief; that the reason why this verification is made by [38] affiant as one of the attorneys for said petitioner, is because none of the officers of said petitioner reside in the County of Lewis and Clark, the county in which affiant resides.

CARL RASCH.

Subscribed and sworn to before me this 18th day of May, 1914.

[Seal]

W. W. PATTERSON,

Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires May 6, 1917.

Due personal service of within petition for removal made and admitted and receipt of copy acknowledged this 18th day of May, 1914.

D. M. KELLY,

Atty. Gen.,

By C. S. WAGNER,

Asst.,

Of Attorneys for Plaintiff.

Filed May 21, 1914. Timothy Miller, Clerk.

[39] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York, one of the defendants in said above-entitled cause, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to do a surety business in the State of Montana, as surety, are held and firmly bound

unto the County of Lincoln, the above-named plaintiff, in the penal sum of Three Hundred Dollars (\$300), for the payment of which well and truly to be made to said County of Lincoln, plaintiff in said above-entitled cause, we bind ourselves, our representatives, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 18th day of May, 1914.

The condition of the above obligation is such that, whereas the National Surety Company, one of the defendants in said above-entitled cause, is about to petition the District Court of the Eleventh Judicial District of the State of Montana, in and for [40] the County of Lincoln, for the removal of said above-entitled action, wherein the said County of Lincoln is plaintiff and the Coast Bridge Company, a corporation, and said National Surety Company, are defendants, to the District Court of the United States for the District of Montana;

NOW, if the said National Surety Company shall enter in the District Court of the United States for the District of Montana, within thirty days from the day of the filing of this petition for removal a certified copy of the record in this action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States in and for the District of Montana, if said United States District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force, virtue and effect.

In Witness Whereof, the National Surety Com-

pany has caused these presents to be executed as the principal thereof by its agent thereunto duly authorized, and its corporate seal to be affixed hereto, and said United States Fidelity & Guaranty Company has caused these presents to be executed as surety by its agent thereunto duly authorized and its corporate seal to be affixed hereto on this 18th day of May, A. D. 1914.

NATIONAL SURETY COMPANY.

By W. K. ARMSTRONG,

Its Attorney in Fact.

[National Surety Co. Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

By CLINTON O. PRICE,

Its Attorney in Fact.

[United States Fidelity & Guaranty Co. Seal]

Due personal service of within bond on removal made and admitted and receipt of copy acknowledged this 18th day of May, 1914.

D. M. KELLY,

Atty. Gen.,

By C. S. WAGNER,

Asst.,

Of Attorneys for Plaintiff.

Filed May 21, 1914. Timothy Miller, Clerk.

[41] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Order of Removal.

On this —— day of May, 1914, the above-entitled cause coming on to be heard on the petition of the defendant, National Surety Company, for the removal of said cause to the United States District Court for the District of Montana, and it appearing that a good and sufficient bond has been filed with said application, conditioned as by the Acts of Congress provided; and it further appearing that notice of intention to file said petition for removal and bond on removal was served on the above-named plaintiff by the said defendant, Coast Bridge Company, prior to the filing of said petition and bond, and it further appearing that said action is one which said defendant, Coast Bridge Company, has a right to have removed to the District Court of the United States for the District of Montana, by virtue of the provisions of the statutes of the United States, on the ground of diversity of citizenship of the plaintiff on the one side and the defendants on the other;

Now, therefore, it is ordered that the said bond be and the same is hereby approved and that the said action be and the same is hereby removed to the United States District Court [42] for the District of Montana; and the clerk of this court is hereby authorized and directed to furnish and provide the said National Surety Company, one of the defendants herein, with a duly certified copy of the record in this cause, upon the payment of the regular and customary fee therefor; and this court will proceed no further in said action, unless the said cause shall be remanded to this court from the said United States District Court for the District of Montana.

Dated this 22d day of May, 1914.

J. E. ERICKSON,
Judge.

Filed May 21, 1914. Timothy Miller, Clerk.

[43] *In the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Lincoln.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Certificate of Clerk to Transcript on Removal.

State of Montana,

County of Lincoln,—ss.

I, Timothy Miller, clerk of the said above-entitled

court, hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled action, heretofore pending in said court, being cause No. 229, wherein the county of Lincoln is plaintiff, and Coast Bridge Company, a corporation, and National Surety Company, a corporation, are defendants, the said record consisting of the complaint filed by said plaintiff in said action on the 25th day of April, 1914, the summons and return thereon filed in said cause on the 12th day of June, 1914, notice of intention to file petition for removal and bond on removal; petition for removal of said action to the United States District Court for the District of Montana, filed by said defendant National Surety Company on the 21st day of May, 1914, and bond on removal of said action filed by said defendant National Surety Company with said petition for removal; separate demurrer of said defendant National Surety Company [44] filed on the 21st day of May, 1914, and the order of removal of said action to the United States District Court for the District of Montana; all as the same appear on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of June, 1914.

[Seal]

TIMOTHY MILLER,
Clerk.

[Endorsed]: Title of Court and Cause. Transcript on Removal. Filed June 17, 1914. Geo. W. Sproule, Clerk.

[45] UNITED STATES OF AMERICA.

*District Court of the United States, District of
Montana.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Action removed to the said District Court, and the
Complaint filed in the Office of the Clerk of said
District Court, in the City of Helena, County of
Lewis and Clark.

Summons.

The President of the United States of America,
Greeting: To the Above-named Defendant, Coast
Bridge Company, a Corporation, and National
Surety Company, a Corporation;

You are hereby summoned to answer the complaint
in this action which is filed in the office of the clerk
of this court, a copy of which is herewith served upon
you, and to file your answer and serve a copy thereof
upon the plaintiff's attorney within twenty days
after the service of this summons, exclusive of the
day of service; and in case your failure to appear or
answer, judgment will be taken against you by de-
fault, for the relief demanded in the complaint.

WITNESS, the Honorable GEO. M. BOURQUIN,
Judge of the United States District Court, District

of Montana, this 15th day of August, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 139th.

[Seal]

GEO. W. SPROULE,
Clerk.

By _____,
Deputy Clerk.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within summons on the 20th day of August, 1914, and personally served the same on the 20th day of August, 1914, on Coast Bridge Company, by delivery to, and leaving with John P. Whitlock, as president of said defendant Coast Bridge Co., named therein personally, at Portland, County of Multnomah, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by James M. Blackford, attached thereto.

Dated this 20th day of August, 1914.

JOHN MONTAG,
U. S. Marshal.

By Tinnies Deboest,
Deputy.

Service of writ.....\$4.00

Mileage to serve 1 @ 12¢..... .12

\$4.12

[46] [Endorsed]: No. 395. U. S. District Court District of Montana. County of Lincoln, vs. Coast Bridge Company, a Corp., and National Surety Company, a Corporation. Summons. James M. Black-

ford, County Atty. D. M. Kelly, Atty. Genl., C. S. Wagner, Asst. Atty. Genl. and Logan & Child, Plaintiff's Attorneys. Filed Aug. 26th, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

[47] *In the District Court of the United States in
and for the District of Montana.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

Motion to Quash Service of Summons.

Now comes the Coast Bridge Company, one of the defendants in the above-entitled cause, and appearing specially for the purpose of this motion only, and for no other purpose whatsoever, and without submitting itself to the jurisdiction of this court, and moves the Court to vacate, set aside and quash the service of summons attempted to be made upon said defendant Coast Bridge Company, upon the ground and for the reasons following, to wit:

1. That the said Coast Bridge Company, at the time of the commencement of this action and at all times prior thereto, are, and ever since have been and now is, and at the time of the attempted service upon it of summons in said action was, a corporation organized and existing under and by virtue of the

laws of the State of Oregon, as is alleged in plaintiff's complaint on file herein, and at all of said times was and is now a citizen and resident of the said State of Oregon, but not a citizen or resident of any State of the United States other than the said State of Oregon.

[48] 2. That the said service of summons was made and attempted to be made, as appears from the return of such service or attempted service, endorsed upon said summons, by the United States Marshal for the District of Oregon, at the City of Portland, in the State and District of Oregon, a place without the District of Montana, wherein said action is pending, and a place beyond and without the jurisdiction of this court.

3. That the said service of summons as made and attempted to be made upon said defendant Coast Bridge Company in said District of Oregon is wholly unauthorized and ineffectual for any purpose.

This motion is based upon the records and papers on file in said court.

Dated this 4th day of September, 1914.

GUNN, RASCH & HALL,
Attorneys for Defendant Coast Bridge Company.

Due personal service of within Motion made and admitted and receipt of copy acknowledged this 4th day of September, 1914.

D. M. KELLY,
Attorney for Plaintiff,
Per J. H. ALVORD.

Filed Sept. 4, 1914. Geo. W. Sproule, Clerk.

[49] *In the District Court of the United States,
in and for the District of Montana.*

No. 395.

COUNTY OF LINCOLN,

vs.

COAST BRIDGE CO. and NATIONAL SURETY
CO.

Order Granting Withdrawal of Demurrer, etc.

By consent of respective counsel in open court, motion to quash herein confessed, and the demurrer of defendant National Surety Company withdrawn and said defendant granted 30 days to answer, Sidney M. Logan, Esq., appearing for plaintiff, and Carl Rasch, Esq., appearing for defendants.

Entered in open court Jan. 2, 1915.

GEO. W. SPROULE,

Clerk.

Attest a true copy:

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy.

[50] *In the District Court of the United States,
in and for the District of Montana.*

COUNTY OF LINCOLN,

Plaintiff,

vs.

COAST BRIDGE COMPANY, a Corporation, and
NATIONAL SURETY COMPANY, a Corporation,

Defendants.

**Separate Answer of Defendant National Surety
Company.**

Now comes the National Surety Company, one of the defendants in said above-entitled cause, and answering separately for and in its own behalf the plaintiff's complaint on file herein:

I.

Admits the allegations of paragraphs 1, 2 and 3 of plaintiff's complaint.

II.

Denies that it has any knowledge or information sufficient to form a belief as to the allegations of paragraph 4 of plaintiff's complaint and therefore denies the same.

III.

Denies that it has any knowledge or information sufficient to form a belief as to the allegations of paragraph 5 of plaintiff's complaint, and therefore denies the same.

IV.

Admits that this answering defendant, and the

said defendant Coast Bridge Company made, executed and delivered to the said plaintiff their obligation in writing in the penal sum of thirty thousand dollars, and admits that Exhibit "B" of plaintiff's complaint, mentioned and referred to in paragraph 6 of said [51] complaint is a copy of said obligation so executed by this answering defendant and said defendant Coast Bridge Company. But this answering defendant denies each and every other allegation contained in said paragraph 6 of plaintiff's complaint.

V.

Denies that this answering defendant has any knowledge or information sufficient to form a belief *as the* allegations of paragraph 7 of plaintiff's complaint.

VI.

Denies that this answering defendant has any knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of plaintiff's complaint.

VII.

Denies each and every allegation and all of the allegations of said complaint not herein specifically admitted or denied.

WHEREFORE, having fully answered said plaintiff's complaint this answering defendant prays judgment that the said action be dismissed as to this answering defendant and that it recover its costs in this behalf expended and incurred.

GUNN, RASCH & HALL,
Attorneys for Defendant National Surety Company.

State of Montana,

County of Lewis & Clark,—ss.

Carl Rasch, being first duly sworn, deposes and says: That he is one of the attorneys of said defendant National Surety Company; that he has read the foregoing answer of said defendant National Surety Company to plaintiff's complaint and knows the contents thereof and that the same is true to the best of affiant's knowledge, information and belief; that the reason why this verification is made by affiant, as one of the attorneys for said defendant National Surety Company, is because said defendant National Surety Company has no officer within the county of Lewis and Clark, State of Montana, wherein its said attorney resides.

CARL RASCH.

Subscribed and sworn to before me this 27th day of January, 1915.

[Notarial Seal]

E. M. HALL,

Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires July 27, 1916.

Service of the within Answer admitted and receipt of copy thereof acknowledged this —— day of January, A. D. 1915.

D. M. KELLY,

Attorney for Plaintiff.

Filed Jan. 27, 1915. Geo. W. Sproule, Clerk.

[53] *In the District Court of the United States,
in and for the District of Montana.*

LINCOLN COUNTY, MONTANA,

Plaintiff,

vs.

THE NATIONAL SURETY COMPANY, a Corpora-
tion,

Defendant.

Judgment.

This cause came on regularly for trial on the 27th day of January, 1916, upon the issues made by the pleadings filed herein by the respective parties, plaintiff and defendant, Sidney M. Logan, James M. Blackford and W. H. Poorman, appearing as counsel for the plaintiff, and Clarence Gilbert and Messrs. Gunn, Rasch and Hall appearing as counsel for the defendants.

A trial by jury having been waived by the parties, the cause was tried before the Court without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause after argument by counsel, was submitted to the Court for consideration and decision; and after deliberation thereon the Court files its finding and decision in writing, and orders that judgment be entered herein in favor of plaintiff in accordance therewith.

WHEREFORE, by reason of the law, and the decision and findings aforesaid, it is ordered, adjudged and decreed that Lincoln County, Montana, the plaintiff herein, do have and recover of and from National Surety Company, a corporation, the defendant herein, the sum of Twenty-nine Thousand Three Hundred Forty-five 40/100 Dollars, with interest thereon at the rate of eight per cent per annum, from ———, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of Eight Hundred and Forty-nine Dollars.

[54] Judgment rendered and entered this 11th day of April, 1916.

[Seal]

GEO. W. SPROULE,
Clerk.

Attest a true copy.

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Missoula, Montana, this 11th day of April, A. D. 1916.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: Title of Court and Cause. Judgment-roll. Filed April 11th, 1916. Geo. W. Sproule, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

COUNTY OF LINCOLN,

Defendant in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

**In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

VS.

NATIONAL SURETY COMPANY, a Corporation
et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial on the 27th day of January, 1916, before the above-entitled Court, Honorable George M. Bourquin, United States District Judge for Montana, presiding,—a jury having been waived by written stipulation,—Sidney M. Logan, W. H. Poorman and James M. Blackford, appearing as attorneys for the plaintiff, and M. S. Gunn, Carl Rasch and Clarence H. Gilbert, appearing as attorneys for the defendant, National Surety Company, whereupon the following proceedings were had and evidence introduced, to wit:

Pursuant to stipulation of the parties permission was granted the plaintiff by the Court to amend the fourth paragraph of the complaint by alleging that the original contract was made on the 18th day of December, 1911, and the agreement modifying same on the 5th day of February, 1912, thereby making the original contract and the agreement of February

*Supplemental Transcript of Record Substituted for Bill of Exceptions
appearing in Original Certified Transcript of Record.

5, 1912, exhibit "A" to the complaint.

The attorneys for the defendant, National Surety Company, thereupon objected to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended upon the ground that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the Court and an exception noted.

Testimony of Louis J. Klenck for Plaintiff.

Thereupon LOUIS J. KLENCK, a witness called and sworn in behalf of the plaintiff testified as follows:

Direct Examination.

My name is Louis J. Klenck. I am, and have been since the first day of January, 1915, county clerk and recorder of Lincoln County. During the years 1911, 1912, 1913 and 1914 I was deputy county clerk and recorder of said county. I have with me and now produce the contract between the Coast Bridge Company and the County of Lincoln, dated the 18th day of December, 1911, and the plans and specifications referred to therein.

Thereupon the contract was offered and received in evidence as Plaintiff's Exhibit 1, the specifications were offered and received in evidence as Plaintiff's Exhibit 2, and the plans were offered and received in evidence as Plaintiff's Exhibit 3.

Said contract, Plaintiff's Exhibit 1 is as follows:

Plaintiff's Exhibit 1—Agreement, December 18, 1911, Between Coast Bridge Co. and County of Lincoln.

“THIS AGREEMENT, Made the 18th day of December, one thousand nine hundred and eleven, between the Coast Bridge Company, a corporation, hereinafter known as the Bridge Company, party of the first part, and the County of Lincoln, hereinafter known as the County, acting through its Board of County Commissioners, party of the second part, WITNESSETH:

The Bridge Company does hereby promise and agree, with and to the County, for the consideration hereinafter mentioned, that it will well and truly build, erect and finish the bridge hereinafter described, conformable to the plans and specifications herein specifically referred to and attached hereto and made a part of this contract, within the time named herein, in good, workmanlike and substantial manner, and also shall and will find and provide labor and good and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the construction and completion of said bridge and all its parts so as to make it a perfect bridge, according to the plans and specifications aforesaid, and all the provisions of this agreement for the sum of Twenty-four Thousand Two Hundred Fifty-two 00/100 Dollars (\$24,252.00/00).

And the said County does hereby promise and agree with and to the Bridge Company that when said bridge is completed, the County will, in consid-

eration of the covenants and agreement being strictly performed and kept by the Bridge Company as specified herein, well and truly pay, or cause to be paid unto the Bridge Company the said sum of Twenty-four Thousand Two Hundred Fifty-two 00/100 Dollars in the manner following:

Upon the completion of the concrete piers, twenty-five per cent of the above-mentioned price. Upon the arrival of the steel for said bridge at the bridge site, fifty per cent of above mentioned price. Upon the completion of the bridge, the remaining twenty-five per cent of the above mentioned price within thirty days after acceptance of the bridge by the County.

The Bridge Company promises and agrees to furnish all material fabricated and erected for a two-span riveted bridge over the Kootenai River at Rexford, Montana, together with three concrete piers; also the lumber and railings for said spans and all other material, as per plans and specifications above referred to and hereto attached.

INSERT. It is further Agreed and Understood: that the Bridge Company shall be allowed by the County the sum of Five (5) Dollars per lineal foot for the pile of trestle approaches to this bridge; the length of same to be determined by the County or its representative.

The Bridge Company promises and agrees to furnish and construct in place any additional concrete required in the said piers below water for fifteen dollars per cubic yard, and any additional concrete required in said piers above water for ten dollars per

cubic yard. It is further agreed and understood that, should the County deduct any concrete from said piers, which is hereby made optional with said County, the Bridge Company will allow the County the sum of Thirteen Dollars per cubic yard for all concrete so deducted below water and the sum of Eight Dollars per cubic yard for all concrete deducted above water. It is further agreed and understood that, should piling be required under any of the piers, the price to be paid for said piling shall be forty cents per lineal foot, and the length of such piling shall be specified and determined by the County or its representative.

The Bridge Company hereby covenants and agrees and promises to and with the County to build the said bridge and all its parts in accordance with the plans, drawings and specifications hereto attached and made a part of this contract, designated as Plan "A," Sheets Nos. 1 and 2, covered by Bid Number 1, submitted by the Coast Bridge Company to the Board of County Commissioners of Lincoln County, Montana, on December 16, 1911, specifications entitled, "Specifications for a Steel Highway and Bridge and approaches over the Kootenai River near Rexford, Montana."

The Bridge Company promises and agrees to begin the construction of said bridge on or before the first day of August, 1912, and to complete the construction of said bridge on or before the first day of February, 1913.

The Bridge Company promises and agrees to furnish an indemnity bond in the sum of Thirty Thou-

sand no/100 Dollars (\$30,000.00/00), with the National Surety Company as surety thereon, for the faithful performance of this contract, and such bond shall be accepted by the County before this contract shall be in force and effect.

It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the same shall have been granted by the Congress of the United States.

It is further agreed and understood by and between the parties that active construction of the work on the said bridge shall not begin until certain funding bonds for the construction of a system of highways and bridges and free ferries, including the said bridge, issued by said County, shall be sold and the money from the same received by the said County.

It is further understood and agreed by and between the parties that, should the Bridge Company be delayed in the construction of said bridge through the delay of delivery of materials at the bridge site, through the failure of any railroad to transport any portion of the same within a reasonable time, or by strikes, *lookouts*, or any other cause or causes beyond the reasonable control of the Bridge Company, then the time for the delivery of such material shall be extended for a period equivalent to such delay or the sum of all such delays.

The Bridge Company agrees and promises to sub-

mit to the County for approval the shop drawings of the steel parts and members of the said bridge.

And it is further agreed by and between the said parties:

First: The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications.

Second: The Bridge Company, at its own proper cost and charges, is to provide all material, labor and other things of every description, for the performance of the several erections.

Third: Should the County, at any time, order alterations, deviations, additions, or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.

Fourth: Should the Bridge Company, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the County shall have power to provide materials and workmen (after three days notice in writing given) by leaving the writing at the last known residence or place of business of the contractor, and to finish said works, and the expense of finishing said works shall be deducted from the amount of the said contract price.

Fifth: Should any dispute arise respecting the meaning of the drawings of specifications, the same shall be decided by the County or its representative, and its or his decision shall be final; but should any dispute arise as to the value of the extra work or works omitted, the same shall be valued by two men—one selected by the County and the other by the Bridge Company—and in case they cannot agree, these two shall have the power to name an umpire, whose decision, if agreed to by one of the two, shall be final.

Sixth: The County shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or for any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same.

Seventh: All payments shall be as above agreed upon, and this contract is completed when the work is finished in accordance with the original plans as modified by alterations of the original plans, if there be any such, and the acceptance of the bridge by the County.

IN WITNESS WHEREOF, the said County of Lincoln, State of Montana, has caused these presents to be signed in its name and behalf by the Board of County Commissioners of said County, and attested by the County Clerk, and the said Coast Bridge Company has caused these presents to be signed in its name and behalf by its president and its secretary

the day and year herein first above written.

LINCOLN COUNTY, MONTANA.

By PAUL D. PRATT,

Chairman Board of County Commissioners.

J. P. BARTLETT,

Commissioner.

[Seal]

F. B. CAREY,

Commissioner.

COAST BRIDGE COMPANY,

By JOHN P. WHITLOCK,

President.

GEO. A. SEARS,

Secretary."

Attest by:

SAMUEL CARPENTER,

County Clerk.

Said specifications, Plaintiff's Exhibit 2, are as follows:

Plaintiff's Exhibit No. 2—Specifications for a Steel Highway Bridge and Approaches Over the Kootenai River.

"SPECIFICATIONS

**For a Steel Highway Bridge and Approaches
Over the Kootenai River**

Near Rexford,

Lincoln County, Montana.

Specifications referred to in contract of date Dec. 18th, 1911, for a bridge at Rexford, Mont., between Lincoln County, Mont., and Coast Bridge Co.

[Seal]

PAUL D. PRATT,

Chairman Coast Bridge Co.

By GEO. A. SEARS,

Vice-Pres.

SPECIFICATIONS.

General Description.

The work covered by these specifications and accompanying plans contemplate the manufacture and erection of a steel highway bridge on steel tubular piers or concrete piers, over the Kootenai River near Rexford, Lincoln County, Montana.

Accompanying Plans.

The accompanying plans show two general designs for the crossing of the Kootenai River at Rexford, Montana, and will be known as plan "A" and Plan "B."

PLAN "A."

Sheet 1.

Sheet 1 shows the profile of the Kootenai River near Rexford, Montana, at the proposed site of the bridge.

The proposed crossing shown on this sheet *suggest* 2-200' Riveted Spans for a superstructure, resting on one stream pier and two shore piers, together with the necessary wooden approaches.

On this sheet is also shown the detail dimensions for the concrete piers, or tubular piers if so desired; and a cross section of the pile approach.

Sheet 2.

Sheet 2 shows the strain sheet and the sizes and makeups of all of the members of the steel work of a 200' riveted type of span suggested for the two spans of this crossing.

There is also shown a cross section of the span at the center, and *on* end view of the span showing the sizes and arrangements of the wind or lateral bracing.

This cross section also shows the clearances and the arrangement and sizes of the floor system and rail.

Sheet 3.

Sheet 3 shows a strain sheet for a 200'-0" pin-connected span as an alternate plan from the strain sheet shown on Sheet 1.

This sheet also shows a cross section and portal showing the arrangements of the lateral or wind system, and the sizes and arrangements of the floor and rail.

PLAN "B."

Plan B contemplates a one span crossing with the necessary approach, across the River at this same point.

Sheet 1.

Sheet 1 shows a profile and general layout of one 352' span and the necessary foundations and approach.

This sheet also shows the detail dimensions of the concrete piers contemplated and also the detail dimensions of tubular piers, if so desired.

The cross section of the pile approach showing the arrangement of the woodwork is also given.

Sheet 2.

This sheet shows the strain sheet and sizes and makeup of all of the members of the 352' pin-connected span; a cross section at the center of the span, and an end view of the span shows the arrangements of sizes and wind *bracking*; also of the floor system and rail.

DRAWINGS.

These specifications and the accompanying drawings are intended to describe and provide for the completed work. They are to be co-operative, and what is called for by either is as binding as if called for by both.

The work therewith described is to be complete in every detail, notwithstanding that every item involved is not particularly mentioned.

The contract price as set forth in the proposal is based on the intent of these specifications, and the accompanying plans, and a copy of same will be attached and be considered part of the specifications and accompanying plans.

FLOOR SYSTEM.

The floor stringers underneath the roadway on the approaches and spans shall consist of ten lines of 4"x14" joists except where the panel length exceeds 20'; when the joists shall be increased in size 4"x16". These joists shall be of such length that they shall overlap the floor beam and caps at least 6". They shall preferably be surfaced one edge to even width; and if not they shall be *clapped* over the floor beams $\frac{1}{3}$ " to give an even bearing. The outside joists shall make butt joint so as to be in perfect alignment for the bolting of the end rail posts. There *shall a* line of 3x6 bridging at center of each panel both on spans and approaches. The floor shall consist of 4x12" plank, 12' long, laid tight and neatly trimmed to even length. They shall preferably be surfaced one side to even thickness and laid with the smooth side down. Each plank shall be spiked with one 7" wire spike

at each intersection of the intermediate joist and by two 7" spikes to the outside joists.

Rail and Guards.

On the east side of the roadway of the span and approaches there shall be a 4x6 wheel guard fastened through and into the outside line of joists by a 5/8"x13" lag screw, having a malleable washer under head. These lag screws shall be spaced about 6' apart.

There shall be a wooden hand rail on both sides of the roadway extending from end to end of the bridge and approaches, and consisting of two lines of 2x6, and one line of 3x10, sufficiently spiked to 4x6 posts; which in turn are to be bolted by 2 1/2" bolts with malleable washers underhead; and nut; to the outside joists. There shall be three posts to each panel of floor system; or they shall be spaced about 6' center to center. Along the center of the roadway there shall be a 6x8 guard timber dividing the roadway into two parts. This guard shall be bolted through the floor to timber washers underneath; with 1/2" bolts. This line of guard timber shall extend from end to end of the steel work and as far on the approaches as may be necessary; to keep the travel on the right side of the bridge in crossing. All guard rail, hand rail posts and hand rail shall be surfaced four sides. Hand rail posts shall be cut of such length that the height of the hand rail above the finished floor shall be at least 3' 6". After completion of the hand rail, posts and stringers of same shall receive two good coats of paint; of a color which may be selected later.

APPROACHES.

The wooden approaches to the spans shall rest on pile bents. These bents shall consist of four piles spaced transversely; 5' 6" center to center. They shall be capped with a 10x12", 20' cap, drift bolted to each pile with a $\frac{3}{4}$ x22" round drift bolt. Each bent shall be swayed with two $\frac{3}{8}$ " sways bolted to the cap and to each pile with a $\frac{5}{8}$ " machine bolt. All bolts shall have the proper malleable washers under head and nut.

All approaches to spans shall be of such length as the local engineer may designate, but no approach shall have a grade greater than five per cent. On the approaches on the hill side of the Libby and Troy bridges there shall be wider approaches, so as to make an easy turn from the approaches, to the new road grade. These approaches shall have the piles and caps and joists called for on the accompanying plans.

SPECIFICATIONS FOR MATERIAL.

Cement.

All cement used shall be one of the standard brands of Portland cement, and must be of such quality as to pass the test adopted as standard by the American Society of Civil Engineers.

Sand.

The sand shall be coarse, clean and sharp and must be free from loam, earth or other foreign matter of any kind, in excess of five per cent, by volume.

Gravel.

The gravel used in the concrete for the abutments, piers and for filling the tubes, shall be thoroughly

cleaned from dust, earth or other objectionable matter, and shall vary in size from $\frac{3}{8}$ " to 2" in greatest diameter.

Concrete.

Concrete shall be of the following proportions:

To each barrel or four bags of cement shall be 12 cubic feet of sand and 22 cubic feet of gravel of the quality given above. Concrete shall preferably be machine mixed, but if mixed by hand the following method shall be employed. It shall be mixed on a close board platform. The material for each batch must be carefully measured to insure the correct proportions. The sand and cement shall be evenly spread and then thoroughly mixed by turning over with hoes or shovels before wetting; they should be then wetted and worked to a soft mortar; then the proper amount previously drenched with water, should be spread over mortar and well incorporated with same by turning the whole over at least three times with shovel or hoes. It should be of the consistency known as wet concrete, and require but little ramming in the forms when laid in layers not thicker than nine inches.

Lumber.

All lumber used shall be native lumber, sound, reasonably well seasoned, free from loose or rotten knots, wind shakes, splits or other defects that would impair its strength or durability. All lumber for the hand rail and guards shall be surfaced four sides.

Paint.

All paint used in this work in shop or field shall

be one of the standard brands of graphite, mixed with pure linseed oil.

Piles.

Piles are to be cut from live trees, and not to be less than 12" at the large end and not less than 9" at the small end. They shall be stripped from all bark; be straight and sound and free from wind shakes. If found necessary in driving, all piles shall be shod with steel or cast-iron shoes to prevent their splitting or crushing under rapid blows of the hammer.

Hardware.

All hardware shall be first class in every respect and of standard sizes and make, and shall be used as called for on the plans in these specifications.

Steel Work.

All steel work shall be as per the standard specifications, and shall conform to the requirements of the standard specifications of the American Bridge Company of New York.

COAST BRIDGE COMPANY SPECIFICATIONS FOR MATERIAL AND DETAILS FOR THE MANUFACTURE OF STEEL HIGHWAY BRIDGES.

SPECIFICATIONS FOR MATERIAL.

Steel.

All steel used in the construction of these bridges shall conform to the manufacturer's standard specifications for medium and rivet steel, as published in the 1913 Hand Book of the Carnegie Steel Company.

PROPORTION OF PARTS.

All parts of the structure shall be proportioned by the following unit strains:

Lateral bracing per square inch.....	18,000	lbs.
Bottom <i>fange</i> of riveted girders, net section.....	14,000	“
Solid rolled beams, used as floor beams or stringers.....	16,000	“
Floor beam hangers.....	8,000	“
Counters and long verticals, forged bars..	12,000	“
Counters and long verticals, plates and shapes.....	11,000	“
Bottom chords and main diagonals, eye bars.....	15,000	“
Bottom chords and main diagonals, plates and shapes.....	14,000	“
Shear on web plates of girders.....	8,000	“
Shear on pins and rivets.....	10,000	“
Bending on pins.....	25,000	“
Bearing projected and semi-intrades....	16,000	“

For rivets in floor system, deduct 20% from the above unit strains.

For rivets in lateral system, add 20% to above unit strains.

For rivets hand-driven or bolts used in field erection, add 25% to the number obtained as above.

In members subject to tension strains, full allowance shall be made for reduction of section by rivet holes.

Compression members shall be proportioned by the following allowed unit strains:

Square Ends. 12,500	Pin and Square Ends. 12,500	Pin Ends. 12,500
<hr/>	<hr/>	<hr/>
2	2	2
(L)	(L)	(L)
1+	1+	1+
<hr/>	<hr/>	<hr/>
2	2	2
36,000R	24,000R	18,000R

where L equals the length of the member in inches and where R equals the least radius of gyration of the member.

STEEL ROLLERS.

Shall be proportioned by the formula $600V/d$ for allowed unit strains per lineal inch of rollers, where d is the diameter of the rollers in inches.

LATERAL STRUTS.

Lateral Struts shall be proportioned by the above formula to resist the resultant due to an assumed initial strain of 10,000 lbs. per square inch upon all the rods attaching to them assumed to be produced by adjusting the bridge or to greatest strain from wind in one direction.

LENGTH.

No compression member shall have a length exceeding sixty times its least width, nor 120 times its least radius of gyration for main members nor 150 times its least radius of gyration for bracing.

FLANGES.

In riveted beams and plate girders the compression flange shall be made of the same gross section as the tension flanges.

Rolled beams shall have generally a depth of not less than $1/15$ of the span.

ALTERNATE STRAINS.

Members subject to alternate strains of tension and compression shall be proportioned to resist each kind of strain. Both of the strains, however, to be considered as increased by an amount equal

to 8/10 of the least radius of the two strains for determining the sectional areas by the above allowed unit strains.

DETAILS OF CONSTRUCTION.

Details.

All the connections and details of the several parts of the structure shall be of such strength, that upon testing, pressure will occur in the body of the members rather than in any of their details or connections.

Preference shall be had for such details as shall be most accessible for inspection, cleaning and painting; no closed sections will be allowed.

The pitch of rivets in all classes of work shall never exceed 6 inches, or sixteen times the thinnest outside plate, nor be less than three diameters of the rivet.

The rivets used shall generally be $\frac{5}{8}$, $\frac{3}{4}$ and $\frac{7}{8}$ inch diameter.

The distance between the edge of any piece and the center of a rivet hole must never be less than one inch, except for bars less than 2 inches wide; when practicable, it shall be at least two diameters of the rivet.

For punching, the diameter of the die shall in no case exceed the diameter of the punch by more than 1/16 of an inch, and all holes must be clean cut without torn or ragged edges.

All rivet holes must be accurately spaced and punched so that when the several parts forming one member are assembled together, a rivet 1/16 of an inch less diameter than the hole can generally be

entered hot, into any hole, without reaming or straining the metal by "drifts"; occasional variations must be corrected by reaming.

The rivets when driven must completely fill the holes, the rivet heads must be round and of uniform size for the same sized rivets throughout the work. They must be full and neatly made and be concentric to the rivet hole and thoroughly pinch the connected pieces together.

Wherever possible, all rivets must be machine driven. The machine must be capable of straining the applied pressure after the upsetting is completed.

Field riveting must be reduced to a minimum or entirely avoided where possible.

The effective diameter of a driven rivet will be assumed the same as its diameter before driving. In deducting the rivet holes to obtain net sections in tension members, the diameter of the rivet holes will be assumed as $\frac{1}{8}$ inch larger than the undriven rivets.

For main members and their connections, no material shall be used of a less thickness than $\frac{1}{4}$ of an inch, and for laterals and their connections, no material less than $\frac{3}{16}$ of an inch in thickness; except for lining or filling vacant spaces.

The heads of eye bars shall be so proportioned and made that the bars will preferably break in the body of the original bar rather than at any part of the head or the neck. All bars 3" in width or more shall be die forged.

The bars must be free from flaws and of full thickness in the necks. They shall be perfectly

straight before boring. The holes shall be in the center of the head, and on the center line of the bar.

The bars must be bored to length not varying from the calculated lengths more than $1/64$ of an inch for each 25 feet of total length.

The lower chord shall be packed as narrow as possible.

The pins shall be turned straight and smooth; chord pins shall fit the pin holes within $1/32$ of an inch.

All bars with screw ends shall be upset at the ends, so that the diameter at the bottom of the threads shall be $1/16$ inch larger than any part of the body of the bar. Where closed sleeve nuts are used on adjustable members, the effective length of the thread shall be legibly stamped at the screw ends of each bar.

All threads must be United States standard, except at the ends of the pins.

The pitch of rivets at the ends of compression members shall not exceed four diameters of the rivets for a length equal to twice the width of the member.

The open sides of all compression members shall be stayed by batten plates at the end and diagonal lattice work at intermediate points.

All bed plates must be of such dimensions that the greatest pressure upon the pedestal stone shall not exceed 250 lbs. per square inch.

All bridges over 100 feet span shall have turned friction rollers running between planed surfaces. These rollers shall not be less than $27/8$ inches diameter for spans 100 feet, and for greater spans,

this diameter shall be increased in proportion of one inch for 100 feet additional. Bridges 100 feet and less in length, one end shall be free to move on smooth surfaces. Allowance should be made for an expansion and contraction corresponding to a variation of 150 degrees Fahrenheit, in temperature.

SHOP PAINTING.

All iron work before leaving the shop shall be thoroughly cleaned from all loose scale and rust, and be given one good coating of graphite paint, well worked into all joints and open spaces.

In riveting work, the surfaces coming in contact shall each be painted before being riveted together.

Pieces which are not accessible for painting after erection shall have two good coats of paint.

The paint shall be of good quality of graphite mixed with pure linseed oil, or such as may be specified in the contract.

Pins, pin holes, screw threads and other finished surfaces shall be coated with white lead and tallow before being shipped from shop.

EXCAVATION.

FOR PIERS AND ABUTMENTS.

The piers and Abutments shall be sunk to the elevation called for on the plans. These shall be made within a timber cofferdam: or by any other means which the contractor may see fit to use in order to reach the desired depth and to conform to the dimensions shown on the plans of these foundations.

After excavation is made to the full depth; piles shall be driven inside, if so ordered by the Engineer. They shall be cut off at an elevation of about 24"

above the bottom of the concrete piers and abutments, and about 6' above the bottom of the steel work if tubular piers are used. These foundations shall be then tamped out and filled with concrete, as specified under concrete.

If steel tubes are used, the upper foot of the top of the tubes shall be made of concrete in the proportion of one, two and four.

All bed plates resting upon the concrete work shall be set on small metal wedges, leveled to the proper elevation and thoroughly grouted with cement mortar in the proportion of one of cement to two of sand, in order that they may have an even bearing throughout.

Forms.

The concrete of the piers and abutments shall be cast within suitable molds. These molds shall be built of lumber, sized to an even thickness and width and finished on the interior in a workmanlike manner, in order to give good finish to the completed concrete. These molds or forms shall be of such size and dimensions that the concrete piers and abutments shall conform to the sizes and dimensions shown on the accompanying plans.

All forms shall be built of good sound lumber and shall be properly pressed and tied together by wire ties, in order that there may be no spreading when the concrete is poured. These forms shall not be removed until at least five days after the concrete has been pressed.

ERECTION.

Pile Driving.

All piles shall be as called for under specifications

and shall be of the length called for on the plans or of a length necessary to fulfill the following specifications as to driving:

Piles shall be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast-iron shoes and properly ringed at the top with a wrought iron ring, to prevent their splitting or brooming. All piles which are broken, split or badly broomed and in the opinion of the engineer are not satisfactory, must be withdrawn and replaced by other piles to the satisfaction of the engineer or inspector in charge.

Steel Spans.

The contractor shall furnish all staging and false work, shall erect and adjust all metal work, place all posts, chords, struts, stringers, floor plank, guards and rail complete as shown on plans and specifications. He shall anchor the spans with proper anchor bolts, fox-bolted to the concrete and set with Portland cement.

Such false work shall be used as in the opinion of the engineer shall permit of no unnecessary risk of accident to the men and material. After the span has been swung and before the floor has been placed, all work shall be thoroughly and evenly painted with one additional coat of paint, as was used in the shop. All recesses which will retain water or through which water can enter, must be filled with thick paint or some water-proof cement.

Field Rivets.

All riveted field connections must be made in the best possible manner. The heads shall be similar to those shown in shop driven rivets. The rivets must be heated uniformly the entire length and when driven they must completely fill the holes. While a workmanlike finish is desired, it must be remembered that the item of prime importance is that the rivet shall be well set up the entire length of the hole. Rivets with cracked heads or heads not concentric with the axis of holes will not be admitted. All rivet heads and marred surfaces must be touched up with paint before any rust has had time to form or field coat of paint is applied.

Painting.

After the erection of the steel work and before any lumber has been placed on the bridge, all steel work shall be given one complete coat of same kind of paint as was used in the shop.

Final.

All work either described or shown herein shall be executed of good material and in good workmanlike manner and shall be acceptable to the Board of County Commissioners of Lincoln County, Montana, or their duly authorized representative."

Plaintiff's Exhibit 3, said plans, consisting of drawings, are hereby referred to and made a part hereof.

Said witness further testified: I have with me and now produce the contract made in February, 1912, modifying the original contract.

Said contract with the specifications referred to

(Testimony of Louis J. Klenck.)

therein was produced and it was thereupon stipulated that a true and correct copy of same is attached to and made a part of the complaint in this action.

Thereupon the witness further testified: I have with me and now produce the bond executed by the defendant, the National Surety Company.

It was stipulated that a true and correct copy of said bond is attached to and made a part of the complaint in this action.

The witness further testified: The Coast Bridge Company was paid for the bridge constructed at Rexford. There was a claim audited on August 31, 1912, for \$12,500. The records in my office show that the Coast Bridge Company was paid the full contract price.

Cross-examination.

The claim of the Coast Bridge Company for \$12,500 was filed August 31, 1912, and allowed September 3, 1912. The payment of \$12,500 was made in pursuant to a resolution appearing in the minutes of the proceedings of the Board of County Commissioners on page 288 of volume 1.

Thereupon the minutes of the proceedings of the Board of County Commissioners, containing a copy of the resolution and a copy of the acceptance by the Coast Bridge Company, were offered in evidence as exhibit No. 7, to which offer Mr. Logan, one of the attorneys for the plaintiff, objected as follows:

“If the Court please we object to the introduction of the resolution upon the following grounds: First, it is improper cross-examination, second, it is

incompetent, irrelevant and immaterial for any purpose.”

The objection was overruled and the exhibit was received in evidence, and is as follows:

**Defendant's Exhibit No. 7—Minutes of Proceedings
of Board of County Commissioners of Lincoln
County, July 26, 1912.**

“Page 288.

Libby, Montana, July 26, 1912.

Special Meeting of the Board of County Commissioners held July 26, 1912, pursuant to the following call:

A special meeting of the Board of County Commissioners of Lincoln County, Montana, is hereby ordered held July 26, 1912, at 10 o'clock A. M. at the Court House at Libby, Montana, to consider business relating to the contracts of the County with the Coast Bridge Co., for bridges at Troy and Rexford, and for the purpose of making new Contracts between the said parties modifying the old contracts, and for the acceptance and approval by the Board of the plans and specifications for the said bridges, and for the making of payments upon the said contracts, and for the purpose of advertising for bids for a bridge over Tobacco River near the Amile Pijean place, and to provide for the construction of a road on the east side of the Kootenai River from

the Ferry Landing to the mouth of O'Brien Creek.

PAUL D. PRATT,
Chairman.

J. P. BARTLETT,
Commissioner.

F. P. GAREY,
Commissioner.

Present Paul D. Pratt, Chairman, J. P. Bartlett and
F. P. Garey, Commissioners, and Samuel Carpenter, Clerk.

The following resolution was adopted:

RESOLUTION.

Whereas, The Board of County Commissioners of Lincoln County, Montana, did on the 18th day of December, 1911, make, enter into, and execute two certain contracts with the Coast Bridge Company of Portland, Oregon, for the construction, erection and completion of two certain iron and steel bridges, cement piers, over and across the Kootenai River near or at the town of Troy, and one in the vicinity of the Village of Rexford, and,

Whereas: The Board of County Commissioners did on the 26th day of July, 1912, make, enter into, and execute a contract with the said Coast Bridge Company, changing the plans and location of the said bridge to be constructed across the Kootenai River at the Town of Troy, and,

Whereas: The Board of County Commissioners have made certain alterations in the plans of the bridge to be erected across the Kootenai River near the Village of Rexford, and

Whereas: Each of the contracts aforesaid pro-

vided for the payment of certain sums of money upon the completion of certain portions of said work, and

Whereas: By reason of the institution of a certain suit in equity entitled Robert Reid, vs. The Board of County Commissioners of Lincoln County, the construction and erection of each of the said bridges respectively has been delayed because of the failure of the said County of Lincoln to secure funds upon the certain sale of bonds, which said funds was to provide for the payment of the contract price of said bridges, and

Whereas: The Coast Bridge Company have ordered manufactured, steel and iron necessary for the construction of said bridges, which said steel and iron is especially adapted for said bridges, and no other structure, and

Whereas: The Coast Bridge Company has furnished good and sufficient bonds in the sum of

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Sixty-five Thousand Dollars with the National Surety Company of New York, as surety conditioned for the performance of the terms and conditions of each of said contracts, and

Whereas: The Coast Bridge Company are prosecuting said work in the construction of said bridges; therefore,

Be it resolved, that the terms and conditions of each of the said contracts in so far as the payments owing and due under the said contract shall be changed and altered to the following manner:

That there shall be paid out of the Special Bridge and Road Fund upon each of said contracts, upon satisfactory proof being furnished to the Board of County Commissioners, that the Coast Bridge Company have ordered to be fabricated especially for each of said bridges, steel and iron necessary therefor, that upon the completion of the piers necessary for each of said bridges and the delivery of said steel and iron at the bridge site of each of said bridges, there shall be paid to the Coast Bridge Company, out of the special Road and Bridge Fund, of the said County such sums as shall be an amount sufficient in addition to the Twelve Thousand and Five Hundred Dollars to equal seventy-five per cent of the contract price of each of said bridges, and that no further payments be due and payable under said contracts or either of them until the completion of said contracts and the final acceptance of said bridge or bridges by the Board of County Commissioners.

Be it further resolved, that this resolution shall be effective and become a part of the original contracts after the Coast Bridge Company shall have signed their acceptance and waiver of the change of the terms of the original contract as herein specified and referred to.

Be it further resolved that the County Clerk be authorized to draw two warrants on the special Road and Bridge Fund in favor of the Coast Bridge Company, each of said warrants to be in the sum of \$12,500, and said sum to be charged in the respective amounts to the Troy Bridge and the Rexford Bridge.

(Testimony of Louis J. Klenck.)

Q. Now, Mr. Klenck, have you any reference there in your papers and documents that you have with you, to the time when a payment was made upon the bridge. I call your attention to page 342 of the minutes of the Board of County Commissioners.

By Mr. LOGAN.—I will tell you, Judge Rasch, we will admit that these payments were all made out of the order provided in the contract, if you care to save that time.

By Judge RASCH.—Then it may be admitted, I imagine, that on the 26th day of November, 1912, an additional ten thousand dollars was authorized to be paid, and was paid to the bridge company.

By Mr. LOGAN.—Yes, we will admit that. Of course, the admission is subject to our objection to the whole testimony relating to payments. As I understood the Court, we can state the grounds of our objection at a later time. One of the grounds is that you have not set up the affirmative defense that entitles this to be admitted.

By the COURT.—You must state your objection, if you have any.

By Mr. LOGAN.—The plaintiff objects to this testimony in addition to the grounds already stated, that there has been no plea, no affirmative plea, setting up an alteration in the contract which would discharge the surety; that it was beyond the power of the County Commissioners to discharge the surety from an obligation required by statute for the construction of a bridge; and upon the further ground that it is an immaterial departure from the contract

(Testimony of Louis J. Klenck.)

under the rules laid down by the Supreme Court of the State of Montana, and the Statutes of Montana.

By the COURT.—The objection will be overruled at this time. If the evidence is not competent, the Court will attach no weight to it.

Q. I call your attention, Mr. Klenck, to page 380 of the minutes of the proceedings of the Board of County Commissioners. What do you find there?

A. There was a special meeting held on December 28, 1912.

By Judge RASCH.—Now I offer in evidence, if the Court please, the minutes of the special meeting of the Board held on the 28th day of December, 1912.

Whereupon said minutes, marked exhibit 8, defendant, were received in evidence and are as follows:

Defendant's Exhibit No. 8—Minutes of Proceedings of Board of County Commissioners of Lincoln County, December 28, 1912.

“Libby, Montana, December 28, 1912.

Board met in Special Meeting in the Court House at Libby, Lincoln County, Montana, at 1 o'clock A. M. pursuant to the following call:

Libby, Mont., December 28, 1912.

A special meeting of the Board of County Commissioners of Lincoln County, Montana, is hereby ordered to be held December 28, 1912, at 10 o'clock A. M. in the Court House at Libby, Montana, held for the purpose of accepting bridge constructed across Kootenai River at Troy and Rexford, and

bridge constructed across Tobacco River on the Emile Pejeau farm by the Coast Bridge Co., and paying for same; the granting of two liquor licenses; the letting of printing contract for the County, the cancellation of the Chas. Z. Pond warrants allowing two Refunds and such emergency matters that might come before the Board.

PAUL D. PRATT,

Chairman.

J. P. BARTLETT,

Commissioner.

F. P. GAREY,

Commissioner.

Present: Paul D. Pratt, Chairman; J. P. Bartlett and F. P. Garey, Commissioners, and Samuel Carpenter, Clerk.

J. M. Duthie, County Surveyor, made report as to the extras on the Troy and Rexford Bridges, Construction, consisting of as follows:

Rexford Bridge, 684 ft. of approach and 1716 ft. of piling

.
Bills allowed Coast Bridge Company, in final acceptance of bridges are as follows:

.
Coast Bridge Co. Balance on Rexford Bridge \$6845.40."

The witness further testified:

The warrant for \$12,500 was written within a day or two after the claim was allowed, but whether it was paid by the treasurer to the Coast Bridge Company, the same day or not, I cannot say.

Testimony of Mr. Donaldson, for Plaintiff.

Mr. DONALDSON, a witness, called and sworn on behalf of the plaintiff, testified as follows:

That the lengths of the piling delivered by him to the Rexford Bridge were 22 feet; that all the piling were of the same length.

Testimony of James Mechan, for Plaintiff.

JAMES MECHAN, a witness called and sworn on behalf of the plaintiff, testified that he was present during the driving of the last piling and he knew that about sixty were driven in the coffer dam.

Testimony of Martella Brandenburg, for Plaintiff.

MARTELLA BRANDENBURG, a witness called and sworn on behalf of the plaintiff, testified that he knew of the length of the piling delivered at the Rexford bridge and he knew they were all of the uniform length of 22 feet.

Testimony of H. O. McCall, for Plaintiff.

H. O. McCALL, a witness called and sworn on behalf of the plaintiff, testified that "I am a diver; that I examined the piling after the bridge had washed out; that all except sixteen of these piles were cut off at the bottom flush with the concrete; that sixteen were protruding from out the concrete a distance of 3 feet 8 inches and that they varied 6 inches from 3 feet 8 inches.

Testimony of Paul D. Pratt, for Plaintiff.

PAUL D. PRATT, a witness called and sworn on behalf of the plaintiff, testified as follows:

I am and have been since 1909 the chairman of the

(Testimony of Paul D. Pratt.)

Board of County Commissioners of Lincoln County. I was one of the commissioners at the time the contract was made with the Coast Bridge Company for the construction of the Rexford Bridge. The Rexford Bridge was never completed in that the painting of the bridge required by the contract was **never** done. I know why the payments were made to the Coast Bridge Company as they were made. Injunction proceedings were brought against the Board to prevent the issuance of the bonds which were afterwards issued and sold to secure the money with which to build these bridges. After the bonds were sold there was some further talk of an attempt being made to stop the construction of the bridges, and our advice and judgment caused us to anticipate the payments as called for in the contract. The Board of County Commissioners did not have any engineer, or other person supervising the construction of the bridge in question. I was not present during the time that the piling was being driven for the center pier in the Rexford bridge, and I do not think that either of the other commissioners was present.

Cross-examination.

The payments were made in a way other than specified by the contract by reason of the difficulty that the Board had in getting the work started.

Q. And with reference to the contract, by whom was the contract prepared?

A. I think that the contract was drafted largely by the Coast Bridge Company, and submitted to the county attorney to pass upon it, who possibly re-

(Testimony of Paul D. Pratt.)

drafted it and rewrote it.

Q. Isn't it a fact that the contract for the construction of the bridge was drawn by the then county attorney of your county?

A. I think you are right about that. Of course, the contract for the building of the bridge was drawn after the plans and specifications had been submitted.

A. Yes, sir.

Q. And with reference to the bond given by the defendant surety company, that bond was likewise prepared by the then county attorney of the county, was it not?

A. No, I don't think that it was; I am not sure about that; in fact I don't believe it was.

On redirect the witness testified as follows:

Q. That bond was executed in Portland, was it not? A. That was my recollection of it.

Testimony of Mr. Kennedy, for Plaintiff.

Mr. KENNEDY, a witness called and sworn on behalf of the plaintiff, testified as follows:

I reside in Spokane, Washington. Am a civil engineer. Have had nine years experience at structural work. I examined the wreck of the bridge at Rexford, Lincoln County, in December, 1913. The direct cause of the collapse of the bridge was that there was a wash there, which undermined the pier, the piling themselves under the pier were not driven sufficiently, after there was a slight underwashing to support the weight of the pier. The pier then, when the wash had proceeded to probably the center or slightly beyond the center of the pier, started to dip

(Testimony of Mr. Kennedy.)

up stream and as far as I could learn, it hung in that position for some time, just generally as the wash proceeded, keeping the piles pushing down into the gravel, then, when it got to a certain angle, it was standing in a position probably dipping north and east, it slanted down until it sheared off the piles as Mr. McCall reported to me, they were sheared off the up stream end, and pulled the piles off on the down stream end, and then the bridge just toppled over sideways. If the piling had been driven to the coffer dam to a point where under the blow of a two thousand pound hammer, falling twenty feet, the penetration would not have exceeded a half inch, the pier would not have toppled over.

There was also evidence introduced on behalf of the plaintiff that the piles were not driven to a point where under the blow of a two thousand pound hammer the penetration would not exceed a half inch, and that the piles were not ringed, nor shod, and were broomed very little, if at all.

Testimony of Paul D. Pratt, for Plaintiff.

PAUL D. PRATT was afterwards recalled as witness for plaintiff, and testified as follows:

The Coast Bridge Company had represented to us that they were competent bridge engineers, competent construction engineers, and that if pilings were necessary, they would so advise us, and if it were necessary to drive pilings they would drive them. We relied on their judgment and allowed them to proceed with the construction of the pier in the man-

(Testimony of Paul D. Pratt.)

ner which we thought was dictated by their best judgment.

On cross-examination witness testified :

Q. Well, now, the law imposes the duty upon the county engineer to supervise the work as it progressed on those bridges, did it not?

By Mr. LOGAN.—We object to that as calling for a conclusion.

Q. The county had a county engineer, did it not?

A. The county had a county engineer. His name was John M. Duthie.

Q. Did he give any attention to the work as it was going on?

A. Not so much to work during construction, as he did in the preliminary stages to the location of the bridge and the data in making designs.

I don't know whether the Bridge Company had any engineer on the work. Mr. McClain was superintendent of the work. He is the only man as far as I know who had charge of the work or any supervision over it. I did not make any inquiries as to whether any of the engineers of the construction company would be in charge of the work, or be in charge of the work as it progressed. Mr. Sears and Mr. Whitlock visited the work at more or less intervals. I think they were at Rexford Bridge on one occasion when the center pier was begun, about the time the excavation was completed. The Board of County Commissioners did not at any time authorize, empower or direct any individual member of the Board to supervise this bridge or see that the bridge

(Testimony of Paul D. Pratt.)

was properly constructed. There was never any agreement that any particular member of the Board should supervise this construction. The Board never made any order directing the county surveyor to supervise the construction of any of these bridges. The individual members of the Board never directed the county surveyor to supervise the construction of any of the bridges.

Thereupon, the bills or claims of the Bridge Company were offered and received in evidence as Plaintiff's Exhibit 10, and are as follows:

Plaintiff's Exhibit No. 10—Bills of Coast Bridge Co.

“July 26, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

Advance payment on bridge at Rexford

ford as per Resolution passed by

Board of County Commissioners July

26, 1912.....\$12,500.00

State of Montana,

County of Lincoln,—ss.

I, G. A. Sears, Secretary Coast Bridge Co., solemnly swear that the above account is true and just, that the items specified therein were furnished in good faith, and that the above amount remains due and wholly unpaid, so help me God.

COAST BRIDGE CO.

By GEO. A. SEARS,

V. Pres.

Subscribed and sworn to before me this 26th day
of July, 1912.

[Seal]

SAMUEL CARPENTER,

By Louis G. Klenck,

Dep.

October 21, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

To part payment on bridge over Kootenai
River at Rexford, Montana, under
contract 2,500.00

State of Montana,
County of Lincoln,—ss.

I, Geo. A. Sears, Vice-pres., solemnly swear that
the above account is true and just, that the items
specified *therein furnished* in good faith, and that the
above amount remains due and wholly unpaid, so
help me God.

GEO. A. SEARS,
Vice-pres.

Subscribed and sworn to before me this 21st day
of Oct., 1912.

(County Seal)

SAMUEL CARPENTER,

County Clerk.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

Account Steel delivered for Rexford
Bridge\$10,000.00

State of Montana,
County of Lincoln,—ss.

I, Geo. A. Sears, Vice-Pres., solemnly swear that the account is true and just, that the items specified therein were furnished in good faith, and that the above amount remains due and wholly unpaid, so help me God.

GEO. A. SEARS,
V. Pres.

Subscribed and sworn to before me this 26th day of Nov., 1912.

(County Seal) SAMUEL CARPENTER,
County Clerk.
By Louis G. Klenck,
Deputy.

Dec. 16, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

As per Vouchers attached.....6845.40

Voucher.

December 16, 1912.

For Bridge across Kootenai
River at Rexford, Montana,
as per Contract dated Dec.

18th\$24,252.00

1911, Revision dated Feb. 5,

1912 3,487.00

Received on account... 25,000.00

Balance due on comple-
tion 2,739.00

\$27,739.00 \$27,739.00

Voucher.

(Testimony of Paul D. Pratt.)

December 24, 1912.

Bridge over Kootenai River, Rexford,
Montana, Piles in foundation 1716 lineal
feet at \$0.40.....\$ 686.40
Voucher.

Bridge over Kootenai River, Rexford,
Montana. Approach to Rexford Bridge
684 lineal feet\$3,420.00

State of Montana,
County of Lincoln,—ss.

I, John P. Whitlock, President Coast Bridge Co.,
solemnly swear that the above account is true and
just, that the items specified therein were furnished
in good faith, and that the above amount remains due
and wholly unpaid, so help me God.

COAST BRIDGE CO.
By J. P. WHITLOCK.

Subscribed and sworn to before me this 28th day
of Dec., 1912.

PAUL D. PRATT,
County Commissioner.”

Said witness further testified that at the time of
the completion of the excavation of the Rexford
bridge I was present, and I found there was a sand
and gravel formation at the bed of the river. I can-
not be positive that the depth had been made in con-
formity with the plans or, whether they had gotten
down farther. I think that we had some talk about
the depth of the excavation that was being made at
that time. I think that the county attorney drew
the contract.

Testimony of C. W. Raynor, for Defendant.

C. W. RAYNOR, a witness called and sworn in behalf of the defendant National Surety Company, testified as follows:

I am a resident of Portland. Was chief engineer of the Coast Bridge Company at and prior to the time of the construction of the bridge at Rexford. The first payment of \$12,500 on the bridge was made in the latter part of July, 1912. At the time of this payment the construction of the bridge had not been commenced.

Q. When the payment was made in September, to what extent had the construction of the bridge progressed?

A. I don't think there had been hardly anything done in the field.

By Mr. LOGAN.—Just a minute, was he up there?

By Mr. GUNN.—No, he was in the office, and getting reports.

A. Everything regarding the job went through my hands, that is, all letters, expense of material of *materials*, and reports.

Q. Do you know whether or not the center pier had been constructed at that time?

A. No, sir, I was on the job, I think it was the first part of October, and at that time the east approach had only been partly built.

When I drew the plans I left the matter of how deep the excavation should go open so it could be determined when the excavation had been made; that the plan was simply gotten up in this regard for the

(Testimony of C. W. Raynor.)

purpose of making a basis for a bid and that the county should determine when the excavation was made, what kind and how many pilings were desired and the County would determine whether they desired any piling to be used at all or not; that the recital in the specifications to the effect that "after excavation is made to the full depth piles should be driven inside, if so ordered by the engineer" referred to the County representative engineer, and in accordance with these specifications the Bridge Company kept no engineer on the job; that if the question of using piling at all under this center pier had been left to me, I would have used none and instead would have carried the concrete on down lower. In my judgment the driving of the piling was not practical; that the information I obtained for drawing these plans, I obtained from the County Engineer of Lincoln County and based it upon the profile prepared by him.

Testimony of M. L. Gerry, for Defendant.

M. L. GERRY, a witness called and sworn on behalf of the defendant, testified as follows:

I am a civil engineer; have had to do with a great many foundations for bridges and piling. I reside at Helena, Montana, and have been engaged in that business for 25 years; that a square pile 8 x 8" in diameter, 22' long, imbedded 4' in the ground would sustain a weight of around 30,000 pounds, and a 2,000 lb. hammer, falling 20 feet would strike 40,000 lbs. to the foot or a total of 800,000 lbs., and that the piling

(Testimony of M. L. Gerry.)

would not stand that sort of a blow; and if a blow of this kind was inflicted upon piling of this kind when at the point of refusal there would be nothing left of the piling; that the blow would be about 400 per cent more than the ultimate strength of the pile.

Testimony of R. A. McClayn, for Defendant.

R. A. McCLAYN, a witness called and sworn in behalf of the defendant, testified as follows:

I reside at Portland now and have been for the past six years employed by the Coast Bridge Company as superintendent of the construction of bridges. Had charge of the construction of the three bridges in Lincoln County, one at Libby, one at Troy and one at Rexford, constructed by the Coast Bridge Company. Started work on the Rexford bridge on September 21, 1912. That is the date the first work was done on the ground. Commenced the construction of the center pier of the bridge October 10, 1912. The center pier was not constructed at the point designated by the plans. Mr. Geary wanted the location of the bridge moved sixteen feet closer to the Rexford side than was done and the center pier was placed sixteen feet nearer the Rexford side of the river than shown on the plans. No change was made in the plans. Mr. Geary was one of the County Commissioners.

Piles used throughout were 8 x 8" and 22' long.

Witness further testified:

Q. Mr. McClayn, let me ask you whether at the time when Mr. Gerry directed you to change the position of the center pier, from the point where it was

(Testimony of R. A. McClayn.)

located on the plans, to a point sixteen feet nearer to Rexford, whether you made any objection, or whether you had any discussion with him as to the advisability of making that change.

A. I did, for the reason—

Q. What did you tell him?

A. Well, we had our false work already driven, also our approach ready. It gave us a short opening. It would throw the pier that was not quite in the center of the river further out in the center of the river, and the river swirling around this way, would have a bigger sweep at the pier than it would have if it had been left ten feet further away to the Rexford shore.

Q. Now, after you had made the excavation to the depth of eight feet and six inches, as you stated, what did you proceed to do further?

A. I notified the commissioners, and I think it was Mr. Pratt probably that measured the hole, no, it was Duthey.

Q. Mr. Duthey measured the excavation?

A. Yes, sir.

Q. And after he had measured it, what did you do then? A. We drove the pile.

Q. By the way, Mr. McClayn, how many piles did you actually use in the coffer dam?

A. Sixty-two.

Q. After the piling had been driven, did any of the county commissioners come there to inspect the work? A. Yes, sir.

Q. Who? A. Mr. Geary.

(Testimony of R. A. McClayn.)

Q. Mr. McClayn, had you received any instructions, or directions from Mr. Geary as to the putting in of any concrete after the piles had been driven, and as to the time when the concrete should be put in?

Q. Had you received any directions from Mr. Geary as to when you should put in the concrete after the piles had been driven? A. Yes, sir.

Q. What were they?

A. He requested us not to put in any concrete until we had notified him.

Q. Well, did you notify him? A. We did.

Q. And then it was, as you just testified a moment ago, that after he had been notified, he came there, and inspected the piles after they had been driven, is that right? A. Yes, he did.

The witness further testified.

Q. Your understanding, then, is that Mr. Geary simply suggested this himself, and you moved it wholly at his suggestion?

A. The company also notified me to do as Mr. Geary wished, to move the bridge.

Q. In other words, whatever he did, they had constituted him the agent of the company for the doing or making any changes that he wanted to make?

A. Certainly not, our specifications, our specifications were to go in as the man in charge of the work dictated us to do.

Q. And they informed you that you were to follow the instructions of Mr. Geary?

A. Exactly.

(Testimony of R. A. McClayn.)

Q. How far were you to follow his instructions, in all matters, or to some matter?

A. With that one matter.

Q. Just the one alone, he had no authority over you, except as to where the pier should be placed?

A. He did at all times, the Commissioners, and the County Surveyor.

Q. What I am trying to get at, how far did that authority extend over you?

A. Absolutely, whatever they requested me to do, I was to do.

Q. In other words, you were the superintendent of the company, and they were your superintendents?

A. Yes, sir.

Q. You were to follow their directions in all things? A. Exactly.

Witness further testified:

There was another change made in the construction of the bridge. The floor of the bridge was lowered three feet below the elevation shown on the plans to coincide with the shore on the Rexford side. In other words, the floor of the bridge, as constructed, was approximately three feet lower than shown on the plans. The change was made after a meeting on the ground at which Mr. Duthie, county surveyor, Mr. Pratt and Mr. Geary, county commissioners, and Mr. Whitlock, president of the Coast Bridge Company, were present, and talked the matter over. I received a letter from the Coast Bridge Company directing me to make the alteration. The change in the height of the bridge from the height

(Testimony of R. A. McClayn.)

shown on the plans, was not noted on the plans, nor were any plans prepared showing the changed height of the bridge.

Cross-examination.

Mr. Geary was the instigator of the change of the location of the center pier. The change was made at his request. The Bridge Company notified me to do as Mr. Geary wished, to move the bridge. I was directed to follow the instructions of Mr. Geary with reference to the matter.

Said witness further testified:

Q. That is, from the position that you held, you were not expected to know any of the reasons, or whys or wherefores? A. Exactly.

Q. You were to follow his instructions, Mr. Geary's instructions?

A. Yes, sir. Mr. Geary knew the length of the piles.

Redirect Examination.

When Mr. Geary requested the change in the location of the center pier I immediately communicated with the Bridge Company in Portland by telegram. (Witness produced telegram, which was offered and received in evidence and is as follows):

Telegram, October 17, 1912, McClane to Coast Bridge Co.

“Libby, Mont., Oct. 17-12.

Coast Bridge Co.,

Portland, Ore.

Gerry contends that extension over banks should practically all be on Rexford side and wants location

(Testimony of R. A. McClayn.)

of piers moved sixteen feet as they now stand Rexford pier is fifty two feet from water opposite pier twenty two feet and located where engineer told me to put them Will see Pratt and go up with delay ten days to move location fourteen bents falsework drove coffer dam sunk ready to dridge wire.

B. A. McCLANE.

840 AM. 18th."

Witness further testified that he received a telegram in reply from the Coast Bridge Company, and produced same. The telegram was offered and received in evidence and is as follows:

Telegram, October 18, 1912, Coast Bridge Co. to McClain.

"October 18, 1912.

To B. A. McClain,

Libby, Montana.

Consider change of location more expensive than beneficial. If board insist, get written instructions to proceed under force account.

Coast Bridge Company.

Charge account Coast Bridge Co."

Witness further testified:

The center pier was completed during the week ending the 14th day of December, 1912.

Mr. McCLAYN, recalled as a witness, testified as follows:

The bridge was actually completed December 31, 1912.

Testimony of Elmer Thompson, for Plaintiff.

ELMER THOMPSON, a witness called and sworn on behalf of the plaintiff, testified as follows on redirect examination:

Q. Mr. Thompson, do you recall whether or not Mr. Gerry was there at any time while those piles were being driven, or after they had been driven?

A. After they had been driven, yes, sir.

Q. And before or after the concrete was being put in?

A. Why, it was before the concrete was put in.

Q. Before the concrete was put in?

A. Yes, sir.

Q. Did he go out and look at the Coffey Dam and the piles, as they were standing there?

A. Yes, sir.

Testimony of Frank B. Geary, for Plaintiff.

FRANK B. GEARY, a witness called and sworn, testified in behalf of plaintiff in rebuttal, as follows:

Q. Mr. Geary, you heard the evidence here relative to the moving of this center pier, a distance toward the Rexford shore of the river, did you not?

A. I did.

Q. The statement of the witness was also to the effect that it was at your suggestion. Have you any knowledge, that is, do you know definitely as to why that pier was moved, and at whose suggestion it was moved? A. It was moved at my suggestion.

Q. You may relate the facts concerning it.

A. That was done in conformity with Mr. Whit-

(Testimony of Frank B. Geary.)

lock's suggestions. After the original contract was entered into, Mr. Whitlock came to the ground, the scene of the Rexford Bridge, and suggested that the bridge was not long enough, as per the original contract,—insisted that it should be forty feet longer, and the pier on the west shore set right at the edge of the bank, and the pier on the east shore next to Rexford should extend as far back on the bank as it would, with 440 feet of bridge, thereby eliminating the possibility of the Rexford shore pier washing out, or in other words, the water going around it. It seems that that had not been arranged, and when I got down there at a certain time, they were preparing to set the pier on the west shore, back clear up on the bank, and I saw this, and said, "It is not right, it is not in accord with Mr. Whitlock's suggestion, and insisted that they must change it so as to put the pier on the west shore right at the edge of the bank as Mr. Whitlock had suggested, and thereby letting the pier on the east shore extend back as far as it would,—the east shore was gravel.

Witness further testified:

Mr. Whitlock is president of the Bridge Company. According to his theory the change was made for the purpose of insuring stability to the bridge. The change was a departure from the original contract as made in December. I don't think the details of the location as changed were incorporated in the modified contract subsequently made, but the additional forty feet was provided for in the supplemental contract. The purpose, as Mr. Whitlock con-

(Testimony of Frank B. Geary.)

tended, of making the bridge longer than specified in the original contract was to place the pier on the east shore back from the water's edge and thereby avoiding the possibility of the water from cutting out the gravel from around the pier. In other words, it was to protect the pier on the east shore. I don't know anything about the floor of the bridge having been lowered. I was not consulted and was not a party to it. First learned that the floor had been lowered during this trial. Mr. Duthie was county surveyor at the time the bridge at Rexford was constructed. The Board of County Commissioners never authorized Mr. Duthie to supervise the construction of the bridge.

Testimony of W. A. Armstrong, for Plaintiff.

W. A. ARMSTRONG, witness called and sworn on behalf of plaintiff, testified as follows:

I am the State Manager of the National Surety Company, defendant corporation. I have a letter here dated March 7th from Logan and Child (here defendant admits that the letter following was written by Logan and Child, counsel for plaintiff.) (Whereupon the following letter was admitted and marked Exhibit 13-D.)

**Plaintiff's Exhibit No. 13-D—Letter, February 6,
1914, Logan & Child to National Security Co.**

“February 6, 1914.

National Security Co.,
Care of Secretary of State,
Helena, Montana.

Gentlemen:

At the request of the Board of County Commissioners and the County Attorney of Lincoln County, Montana, we are writing you concerning the bond furnished by you for the Coast Bridge Company bridge at Rexford, in the County above named.

In the spring of 1913, the middle pier of this bridge was destroyed and in consequence thereof the bridge collapsed. Recently the County Commissioners met with the officers of the Coast Bridge Co. at Spokane and endeavored to agree on some sort of an adjustment of the claim of Lincoln County, but were unsuccessful, and it now becomes necessary for us to take this matter up with you with a view to securing, if possible, a friendly adjustment of the matter and failing in that, to assure you that we will be compelled to commence action on the bond furnished by you. We wish to invite your attention to those provisions of the bond by which you guarantee that the work shall be done strictly according to the plans and specifications. It is our contention that the company failed to drive the piling in the pier to refusal and that they were required to do this under the following clause in the specifications, viz.:

‘Pile to be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one half inch.’

We have had the wreck examined by a competent engineer who called a diver to his assistance, and we think we can clearly demonstrate that the cause of the collapse was the failure to drive the piling in accordance with the specifications mentioned. We wish also to call your attention to the fact that the steel from this bridge is now lying in the bottom of the Kootenai river. We have no means of knowing whether this steel, or any part of it, may be salvaged at a cost which would justify the undertaking. The Coast Bridge Co. has declined to salvage the material or to indemnify the County if the latter should undertake the work. During high water it would probably be impossible to recover the material and it may be possible that high water and ice will totally destroy it. Therefore, we feel it our duty to advise you of this condition so that if you so desire to salvage the material you may have an opportunity to do so during the winter months when the water is low.

We would be glad to take this matter up with you in the same friendly way that we have heretofore taken it up with the Coast Bridge Co. and if you take the position that there is no liability on the bond, we would be glad to be so advised at an early date and to the end that we may commence proceedings to

test the question of liability.

Very truly yours,

LOGAN & CHILD."

Witness Armstrong continued:

Mr. McGee is the General Assistant Solicitor of the National Surety Company. It is his signature which is attached to Exhibit 14-D. (Whereupon Exhibit 14-D was offered and admitted.)

**Plaintiff's Exhibit No. 14-D—Letter, March 14, 1914,
Magee to Logan & Child.**

“NATIONAL SURETY COMPANY.

New York, March 14, 1914.

Re Bond #634973—File No. 8976—Coast Bridge
Company.

Logan & Child, Esqrs.,

Conrad Bank Building,
Kalispell, Montana.

Dear Sirs:

Your letter of the 6th ult. addressed to the National Security Company, c/o Secretary of State, Helena, Mont., has been referred here for our attention. Inasmuch as this Company was surety on the bond of the Coast Bridge Company for the erection of a bridge at Rexford, Mont., we have no doubt the letter was designed for us.

This Company was merely surety on the bond in question, and, of course, must be governed by the instructions and directions of its indemnitors in all matters arising under it. We are definitely advised that the work was performed in strict accordance with the contract and specifications, that it was done

(Testimony of W. A. Armstrong.)

under the supervision of the County and its representatives, and that it was finally accepted as a fully completed contract by the County.

Under these circumstances, we must reserve all our rights and defenses and deny liability.

Very truly yours,

JOSEPH MAGEE,

Assistant General Solicitor."

Whereupon defendant admitted that the National Surety Company, defendant herein, is a surety company for compensation.

Q. In this letter they refer to their indemnitor. Now in your business has that word "indemnitor" any particular meaning. That is, any special meaning?

By Mr. GUNN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—What is the purpose of this?

Whereupon plaintiff offered to prove by the witness Armstrong, that the National Surety Company was not the real defendant in this action. That the surety company had turned over the management of this case to the Coast Bridge Company and that the Coast Bridge Company had guaranteed the National Surety Company; had provided attorneys and that the National Surety Company was only a nominal defendant; and that the entire control and management of the case had been taken over by the Coast Bridge Company, under the arrangement by which the Coast Bridge Company was to pay the entire expense, and that the Surety Company had been in-

demnified by the Coast Bridge Company. The purpose is to show that the surety company is an indemnified surety.

Whereupon the defendant's objection was sustained by the Court.

The foregoing is all of the testimony relating to payments made by Lincoln County to the Coast Bridge Company for the construction of the bridge at Rexford, relating to the changes in the bridge from the plan of the bridge referred to in and made a part of the contract for the construction of the bridge, relating to the supervision of the construction of the bridge by or in behalf of the county, and relating to any change or modification of the contract by the resolution of the Board of County Commissioners adopted at the meeting of said board held the 26th day of July, 1912, and the acceptance thereof by the said Bridge Company. No testimony was offered or introduced showing that the War Department of the United States ever approved the plans and specifications for said bridge, or granted permission for the construction of same, and no evidence was offered or introduced by either of the parties touching the question of the navigability or non-navigability of the Kootenai River at the point where the Rexford Bridge was constructed or elsewhere, and no testimony was introduced or offered showing that the National Surety Company ever had any notice or *or* acquiesced in a change or modification of the contract by the resolution adopted by the Board of County Commissioners July 26, 1912, and

the acceptance thereof by the Bridge Company.

At the conclusion of the testimony the National Surety Company moved for judgment in its favor upon the grounds and for the reasons, among others, that the complaint does not state a cause of action; that the change and modification in the contract as made by the resolution of July 26, 1912, and the acceptance thereof by the Bridge Company, relieved and released the Surety Company from any liability; that by making the payments of the contract price before such payments were due, according to the contract, the Surety Company was released and relieved from liability; that by departing from the plan for the construction of the bridge, adopted by the contract, in changing the location of the center pier and lowering the floor of the bridge, the Surety Company was released from all liability; that by failing to allege or prove that the plans and specifications had been approved by the War Department of the United States; or that permission for the construction of said bridge had been obtained from said department, the plaintiff had not established any liability against the Surety Company; that the Surety Company was released from liability by the failure of the county to appoint an engineer or inspector to supervise and superintend the work of the construction of said bridge and by failing to take any precaution to insure the performance of the contract; that the bond has reference to a contract for the construction of a "two-span riveted bridge * * * , together with three concrete piers,"

whereas the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers, by reason of which the Surety Company is not liable.

Thereupon the Court took said motion under advisement and thereafter on the —— day of April, 1916, overruled said motion, to which defendant accepted. Upon denying said motion the Court found in favor of the plaintiff and rendered judgment accordingly.

And thereafter and on the —— day of April, 1916, judgment was rendered in favor of said plaintiff and against said defendant National Surety Company for the sum of \$29,345.40, together with plaintiff's costs and disbursements taxed at the sum of \$——.

That the decision and opinion of said Court in said cause was in writing, and, omitting title of court and cause, is as follows:

Opinion.

Action by a building of a bridge against the contractor's surety. Defendants objection to any evidence "for the purpose of the record * * * simply a formal matter," no defect in the complaint being pointed out, was overruled as of a class disfavored in that it tends to defeat justice rather than to promote it, the court stating if the complaint was defective, amendment would be allowed. If necessary, amendment is deemed made to conform to proof.

The complaint is that the contractor, the Coast Bridge Company, failed to perform its contract in that it did not drive the center pier piles as required

by specifications and because of which the pier undermined and with the bridge fell. The answer is of denials only. The structure was a highway bridge of 18 feet floor width and two 220 feet spans supported by a center pier. It was at Rexford, Montana, and over the Kootenai River, a swift mountain stream over 400 feet wide, the water stage varying in depth from 12 to 30 feet.

The contractor agreed to provide "all material, labor and other things of every description" to build the bridge "in good workmanlike and substantial manner * * * so as to make it a perfect bridge according to the plans and specifications" furnished by it. These plans were indefinite in the matter of the depth of the center pier, extent of concrete and whether or not piles would be used therein, the contractor leaving "that open to be determined after" excavation. The specifications provided that all piers would "be sunk to the elevation called for on the plans" and "piles shall be driven inside if so ordered by the Engineer"; that piles would be round, not less than 12 inches at the larger end and 9 at the smaller, and of the "length called for on the plans," though the contract of which the specifications were a part stated the length "shall be specified and determined by the county or its representative"; and that the piles would be shod and ringed if necessary and driven with a hammer of not less than 2000 pounds and under the last blow falling 20 feet, the penetration not to exceed one half inch.

References to "the engineer" are ambiguous save in one instance to "the local engineer." If con-

strued to import the builder's engineer (though these were the contractor's specifications) there was no stipulation obligating the builder to secure an engineer. It was optional and the builder secured none. For the center pier the contractor excavated about 8½ feet deep in sand and gravel. Its superintendent testified the bottom was then tested with an inch pipe and a maul and by four piles eight inches square which were driven until destroyed, "probably four feet" deep. He ordered like piles 22 feet long and 62 of them were driven, it would seem to depths varying from 3 feet 5 inches to 3 feet 11 inches.

When the driving commenced the water was about 18 feet deep and gradually rose, each pile being driven until its top was practically at water level. They were not ringed nor shod, and broomed little if any. Around and upon them the concrete center pier was constructed. About six months later the water undermined the pier so that it overturned and the bridge fell. A diver found that about 16 piles at the downstream end of the pier were intact, the others having been sheared off. Without further detailing the evidence and conflicts in facts and opinions, the finding is that the piles were not driven in accordance with the contract and to refusal, and that because thereof the pier and bridge fell.

It is probable as urged by defendant that these smaller piers would not endure driving strictly as specified. But for all that appears the builder did not order them and their use was the contractor's choice. Even if maintainable that the builder had

knowledge and acquiesced, in that one of its board of commissioners at least saw the piles after they were driven, it had no knowledge that they were not driven as nearly as possible in accordance with specifications and to refusal. And this view of the piles was from the false work, nothing appearing that it sufficed to and did disclose smaller piles had been driven. Furthermore, the board member was in substance told by the contractor's superintendent that the piles had been driven seven feet and to refusal, and so satisfied. Since the undermining re-filled and its extent is not definitely known, it is urged that it may have been so great that in any event the result would have been the same.

The failure to drive the piles to refusal is a sufficient and reasonable cause for the destruction of the bridge. It is clear the undermining was so great that these piles could not resist it. That it might also have been so great that these piles driven to whatever unknown depth would have been refusal, could not have resisted it, is mere conjecture and not permissible.

Curiously enough, defendant introduced evidence and contends that the excavation for the pier should have been deeper and no piles used; that the damage is due to defective plans and poor engineering. To concede it would not seem to better defendant's case, for the contractor was responsible for both plans and engineering. And if necessary, the complaint would be deemed amended to conform to this contention and proof, involving no change in the cause of action but only in the particulars thereof.

The contract provided it would not take effect until Congress authorized the bridge and the War Department approved the plans and specifications. Congress authorized the bridge (See 37 Stat. 71) to be built in accordance with Act Mar. 23, 1906 (34 Stat. 84). This latter Act provided that a bridge over navigable waters, authorized by Congress, shall not be built until the plans and specifications have been approved by the Secretary of War and the Chief Engineers. Violation of the Act is a misdemeanor punishable by fines, and the bridge may be removed.

For the purposes of this case the contract and acts of the parties suffice to establish that Kootenai River is navigable. There is neither allegation nor direct evidence that the approval aforesaid was secured. Because thereof defendant urges that the contract did not take effect, that the bridge was builded unlawfully, and that the surety is not liable. The contract was lawful, and since it has been performed it must be presumed it was, as it could be, lawfully performed—that the contingency happened (the necessary approval) upon which it was to become effective. Then too, so far as this action is concerned, the obligation to secure such approval, if not more was as much the contractor's as the builder's. The former could not lawfully perform its contract prior to approval. A surety engages its principal, will lawfully perform. And if the latter unlawfully performs its contract, the surety is not discharged unless the builder knew of and acquiesced in such unlawful performance. And upon the surety is the burden to prove this.

It is admitted payments were made to the contractor "out of the order" of the contract, and were "anticipated"; but this does not serve to show that substantial departure from the contract which alone may discharge a surety in that it may injure him. If the payments were made out of the order stipulated, it may be the contingencies upon which payments were due happened out of the order anticipated and that the payments were properly made. Again, county warrants seem to have been referred to as payments, and it does not appear when the money was paid or the warrants even delivered.

The builder accepted the bridge. This waived all the contractor's defaults discoverable by reasonable inspection, like failure to paint the completed bridge (which however, does not appear to have been of the contract), but not those not so discoverable, like the defective piles. For the latter but not the former the surety is liable. There remains but the amount of damages. The contract price paid was \$29,345.40. The bond is in the sum of \$30,000. Of the bridge the shore piers and approaches alone remain. The county has not rebuilt. It may not. It would not seem bound to do so and to incorporate these remnants to mitigate damages. Under the circumstances such action well may be imprudent and impracticable. Its right is to refrain or to build of a new design and materials.

See *U. S. v. Fidelity Co.* 236 U. S. 526.

3 *Suth. Damages*, Sec. 699.

The loss is total. Any salvage is the contractor's. Plaintiff does not claim or suggest it is entitled to

interest, and the judgment will be for the contract price paid and costs.

And thereafter on the —— day of April, 1916, pursuant to stipulation of the parties the judge of said court made an order granting the defendant the National Surety Company thirty days from said date within which to prepare and serve this, its bill of exceptions.

And now comes the defendant National Surety Company and submits herewith this Amended Bill of Exceptions, to stand in place of the Bill of Exceptions heretofore settled in this action.

Dated this 5th day of July, 1916.

COY BENNETT,

GUNN, RASCH AND HALL,

Attorneys for National Surety Company.

Order Settling Amended Bill of Exceptions.

United States of America,

District of Montana.

I, George M. Bourquin, Judge of the District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct Bill of Exceptions in said action, and that the recitals therein regarding the testimony introduced are true and correct, and I do further order as well as certify that the Bill of Exceptions formerly, to wit, on the 6th day of May, 1916, settled in this action is by omission incomplete and this bill of exceptions is now by me hereby settled, allowed and approved as a true and correct bill of exceptions in said action to stand in place of the said former bill of exceptions.

Dated in open Court this 15th day of July, 1916.

BOURQUIN,

Judge.

**Certificate of Clerk to Supplemental Transcript of
Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 55 pages, numbered consecutively from 1 to 55 inclusive, is a full, true and correct copy of the original amended bill of exceptions in the above-entitled cause settled and allowed July 15, 1916, and hereby returned as a supplement to the original transcript on writ of error in said cause.

I further certify that the additional costs for such supplemental transcript amount to the sum of Twenty-five 20/100 Dollars (\$25 20/100), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 15th day of July, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
7/15/1916. G. W. S.]

[Endorsed]: No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. County of Lincoln, Defendant in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 19, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Thereafter, on May 29, 1916, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

Assignment of Errors.

Comes now the above-named defendant National Surety Company and presents and files, with its petition for a writ of error herein its assignment of errors as follows:

1. The District Court of the United States, for the District of Montana, erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended, which objection was based upon the ground that said complaint as amended does not state facts sufficient to constitute a cause of action.

2. The said Court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for judgment in its favor.

3. The said Court erred in holding and deciding that the complaint as amended states a cause of action.

4. The said Court erred in holding and deciding that the change and modification in the contract, as made by the resolution of July, 6, 1912, and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant the National Surety Company from the liability provided for in the bond furnished by said Surety Company.

5. The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the plaintiff having made payments of the contract price to the Bridge Company before said payments were due according to the contract between said plaintiff and said Bridge Company.

6. The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason

of the change in the location of the center pier and the lowering of the floor of the bridge, which constituted material departures from the plan for the construction of the bridge, adopted by the contract between said plaintiff and the Bridge Company.

7. The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding there is neither allegation nor proof that the plans and specifications for the bridge had been approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said department.

8. The Court erred in holding and deciding that the plaintiff was entitled to recover, notwithstanding the failure of the plaintiff to appoint an engineer or inspector to supervise and superintend the work of construction of said bridge and by failing to take any precaution to insure the performance of the contract with said Bridge Company.

9. The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a "two-span riveted bridge...together with three concrete piers...while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers."

10. The said Court erred in rendering judgment for the plaintiff.

WHEREFORE, the said defendant and plaintiff

in error prays that the said judgment may be reversed.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, Petition for Writ of Error and Order allowing same were duly filed and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Petition of the Defendant National Surety Company
for Writ of Error and Supersedeas.**

National Surety Company, a defendant in the above-entitled cause, feeling itself aggrieved by the proceedings had in said cause, and by the decision of the Court and the judgment entered in said cause on the 11th day of April, 1916, for the sum of \$29,345.40, and the further sum of \$849.00 costs, in favor of said plaintiff, and against said defendants, comes now by Clarence H. Gilbert and Gunn, Rasch & Hall, its attorneys, and petitions said court

for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of said security, all proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And the said defendant herewith presents *it* assignment of errors in accordance with the rules of the said United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioner, the defendant will ever pray, etc.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for National Surety Company.

**Order Granting Writ of Error and Fixing Amount of
Supersedeas Bond.**

On motion of the attorneys for the defendant National Surety Company, the foregoing petition for writ of error is hereby granted and it is ordered that a writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment described in said petition, be and is hereby allowed, and that the amount of the bond on said writ of error be and is hereby fixed at the sum of \$2,500, and it is further ordered, in accordance

with the stipulation of the parties filed in said cause, that said writ of error shall operate as a supersedeas the same as though full security should be given as required by rule 13 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

GEO. M. BOURQUIN,

Judge.

Filed and entered May 29, 1916. Geo. W. Sproule,
Clerk.

Thereafter, on May 29, 1916, a Stipulation as to Bond was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Stipulation that Writ of Error Operate as
Supersedeas, etc.**

WHEREAS, the defendant National Surety Company is about to petition for a writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment rendered and entered in the above action:

NOW, THEREFORE, it is stipulated and agreed that said writ of error, if issued, shall operate as a supersedeas, provided the said National Surety

Company shall give and furnish upon said writ of error a bond in the penal sum of \$2,500, conditioned to answer all damages and costs that may be awarded against it if it fails to make its plea good, and that an order may be made and entered in said cause in accordance with this stipulation.

Dated this 26th day of May, 1916.

SIDNEY M. LOGAN,
JAMES M. BLACKFORD,
W. H. POORMAN,

Attorneys for Plaintiff.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, Bond on writ of Error was duly filed herein, in the words and figures following, to wit:

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, National Surety Company, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto Lincoln County in the full and just sum of \$2,500, to be paid said county, its attorneys, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and

assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 29th day of May, 1916.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in an action pending in said court between Lincoln County, as plaintiff, and National Surety Company, as defendant, a final judgment was rendered against said defendant and in favor of said plaintiff, and the said defendant National Surety Company, having obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to said Lincoln County is about to be issued, citing and admonishing said county to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such that if the said National Surety Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Dated this 29th day of May, 1916.

NATIONAL SURETY COMPANY.

[Seal]

By W. K. ARMSTRONG,

Attorney in Fact.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By CLINTON O. PRICE,

Attorney in Fact.

The foregoing bond is hereby approved this 29th day of May, 1916.

BOURQUIN,

United States District Judge.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, a Writ of Error was duly issued herein, which original Writ of Error is hereto annexed, being in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court, and between National Surety Company, a corporation, plaintiff in error, and Lincoln County, defendant in error, a manifest error hath happened, to the great damage of the said National Surety Company, the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together

with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 28th day of June, 1916, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States, District of Montana, the 29 day of May, in the year one thousand nine hundred and sixteen.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, in
and for the District of Montana.

The foregoing writ of error is hereby allowed.
May 29, 1916.

BOURQUIN,
District Judge.

Service of the within and foregoing writ of error and receipt of copy thereof is hereby acknowledged this 29th day of May, 1916.

SIDNEY M. LOGAN,
JAMES M. BLACKFORD,
W. H. POORMAN,
Attorneys for Defendant in Error.

Answer of Court to Writ of Error.

The Answer of the Honorable The District Judge of the United States for the District of Montana, to the foregoing Writ.

The record and proceedings whereof mention is

made, with all things touching the same, I certify under the seal of said District Court of the United States for the District of Montana, to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: #395. In the District Court of the United States, for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Writ of Error and Order Allowing Writ. Filed May 29th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on May 29, 1916, a Citation was duly issued herein, said original Citation being hereto annexed and being in the words and figures following, to wit:

Citation on Writ of Error.

The President of the United States, to Lincoln County, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein National Surety Company is

plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 29th day of May, A. D. 1916, and of the Independence of the United States the one hundred and fortieth.

BOURQUIN,

United States District Judge.

Service of the foregoing citation acknowledged and copy thereof received this 29th day of May, A. D. 1916.

SIDNEY M. LOGAN,

JAMES M. BLACKFORD,

W. H. POORMAN,

Attorneys for Defendant in Error.

[Endorsed]: #395. In the District Court of the United States, for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Citation on Writ of Error. Filed May 29th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on June 20, 1916, Praeceptum for Transcript was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to writ of error allowed in the above-entitled cause, and to incorporate into such transcript of record the following papers, to wit:

1. Judgment-roll.
2. Bill of Exceptions of Defendant National Surety Co.
3. Assignment of Errors of Defendant National Surety Co.
4. Stipulation Waiving Supersedeas Bond.
5. Petition of Defendant National Surety Co., for Writ of Error and Supersedeas, and Allowance of Same.
6. Bond on Appeal.
7. Writ of Error.
8. Citation on Writ of Error.

Request is further made that the same be duly certified by you as required by law and the rules of court.

CLARENCE H. GILBERT,
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed June 20, 1916. Geo. W. Sproule, Clerk.

Thereafter, on June 24, 1916, an Order Enlarging Time to File Record on Appeal was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY et al.,

Defendants.

**Order Extending Time to July 8, 1916, to File
Record.**

Good cause being shown therefor, it is ordered that the time for filing the transcript on writ of error herein, in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including the 8th day of July, A. D. 1916.

BOURQUIN,
Judge.

Dated June 24, 1916.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 123 pages numbered consecutively from 1 to 123 inclusive, is a full, true and correct transcript of the pleadings, process and judgment and other proceedings had in said cause, mentioned in the praecipe for transcript of record therein, and of the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original Writ of Error and Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty-seven 20/100 Dollars (\$57.20), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the District of Montana, at Helena, Montana, this 28th day of June, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
6/28/16.]

[Endorsed]: No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. County of Lincoln, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 3, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Order Enlarging Time to File Record and Docket
Cause to July 25, 1916.**

Upon application of defendant National Surety Company for good cause shown it is hereby ordered that the defendant National Surety Company need not file record or docket case in the Circuit Court of Appeals until twenty days from this date and its

time is extended until the expiration of said twenty days.

Dated this 5th day of July, 1916.

BOURQUIN,
Judge.

[Endorsed]: No. 395. In the District Court of the United States for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Order. Entered July 6, 1916.

No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 10, 1916. F. D. Monckton, Clerk.

No. 2825

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court
of the District of Montana.

Filed

OCT 3 - 1916

F. D. Monckton,
Clerk.

No. 2825

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**
FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court
of the District of Montana.

STATEMENT OF THE ISSUES

The complaint on pages 2 to 29 of the record shows that on April 25, 1914, the County of Lincoln filed a complaint in the District Court of the Eleventh Judicial District of the State of Montana against the Coast Bridge Company, a corporation, and National Surety Company, a corporation, asking for a judgment in the amount of \$30,000 and for costs of the suit.

The plaintiff charges that on the 18th day of December the Coast Bridge Company entered into a contract in writing with the County of Lincoln by the terms of which Coast Bridge Company, for and in consideration of the payment of certain sums of money, undertook and agreed to construct across the Kootenai river at Rexford, in the County of Lincoln, State of Montana, a steel bridge according to certain plans and specifications which are stated to be a part of the contract.

The complaint also discloses that in the month of February, 1912, the County of Lincoln and the Coast Bridge Company made certain modifications of the specifications which were attached to and made a part of the contract, and that by such changed and altered specifications the Coast Bridge Company agreed that all piles to be used in the construction of the bridge should be driven with a hammer weighing not less than two thousand pounds, and that the penetration of the last blow of such hammer falling twenty feet should not exceed one-half inch, and that if necessary

such piles should be shod with steel or cast iron shoes and properly ringed at the top with wrought iron rings to prevent their splitting and brooming, but that the defendant Coast Bridge Company failed and neglected to drive said piling with a hammer weighing not less than two thousand pounds falling twenty feet, so that the penetration at the last blow did not exceed one-half inch, and that by reason of the failure and neglect of the defendant Coast Bridge Company to drive said piling in accordance with the terms of said specifications the foundation of the center pier in said bridge became and was at all times insecure and unsafe, and by reason of the bottoms of such piling resting on insecure and shifting gravel and sand occasioned by the defendant Coast Bridge Company failing to drive such piling in accordance with the specifications the foundation of said middle pier was placed in great danger of being undermined and destroyed, and in the spring of 1913 by reason of the failure and neglect of the defendant Coast Bridge Company as aforesaid said center pier was washed away, toppled over and destroyed, and the entire bridge structure resting thereon entirely collapsed and rendered useless and of no value, to the damage of the County of Lincoln in the sum of \$30,000.

It is also alleged that on the 18th day of December, 1911, the Coast Bridge Company and the defendant National Surety Company made, executed and delivered to the County of Lincoln their

obligation in writing in the penal sum of \$30,000, conditioned to the effect that if the Coast Bridge Company should faithfully and truly observe and comply with all the terms, conditions and provisions of said contract and the plans and specifications mentioned, and should well and truly and fully do and perform all manner of things by them undertaken to be performed under said contract, then in such event said obligation should be null and void, otherwise to be and remain in full force and effect.

A copy of the bond is attached to the complaint and made a part thereof. A copy of the changed plans and specifications under date of February, 1912, is also attached to the complaint.

The complaint recites that the County of Lincoln paid the Coast Bridge Company \$30,000 for the construction of the bridge, and it is stated in the complaint that the payments were made without knowledge or means of knowledge on the part of the County or its officers of any alleged defects in the construction of the bridge, or any failure on the part of the Coast Bridge Company to construct the same strictly in accordance with the contracts and plans and specifications therefor.

On page 61 of the record it is shown that pursuant to stipulation of the parties plaintiff was granted permission to amend the fourth paragraph of the complaint by alleging that the original contract was made on the 18th of December, 1911, and the agreement modifying the same on the 5th day

of February, 1912, thereby making the original contract and the agreement of February 5, 1912 Exhibit A to the complaint.

The case was removed to the federal court on the application of the National Surety Company (Record, pages 33 to 47).

No service of summons was ever secured on the Coast Bridge Company, and Coast Bridge Company was not a party to the case or judgment.

The National Surety Company filed an answer wherein the allegations of the complaint were both specifically and generally denied, except that the execution of the bond on the part of the National Surety Company was admitted.

The case was tried before the Court without a jury, upon the issues joined between the County of Lincoln and the National Surety Company, and judgment was rendered on the 11th of April, 1916, against the National Surety Company in the sum of \$29,345.40.

ASSIGNMENTS OF ERROR.**I.**

The District Court of the United States for the District of Montana erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended, which objection was based upon the ground that said complaint as amended did not state facts sufficient to constitute a cause of action.

II.

The court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for a judgment in its favor.

III.

Said court erred in holding and deciding that the complaint as amended stated a cause of action.

IV.

Said court erred in holding and deciding that the change and modification in the contract as made by the resolution of July 6, 1912 and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant National Surety Company from the liability provided for in the bond furnished by said Surety Company.

V.

The court erred in holding and deciding that the defendant National Surety Company was not

released and relieved from liability by reason of the plaintiff having made payments on the contract price to the Bridge Company before said payments were due, according to the contract between said plaintiff and said Bridge Company.

VI.

Said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge which constituted material departures from the plan for the construction of the bridge adopted by the contract between the said plaintiff and the Bridge Company.

VII.

The court erred in holding and deciding that the plaintiff is entitled to recover notwithstanding there was neither an allegation nor proof that the plans and specifications for the bridge were approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said department.

VIII.

The court erred in holding and deciding that the plaintiff was entitled to recover notwithstanding the failure by plaintiff through its engineer or inspector to take any precaution to insure the performance of the contract by said Bridge Company.

IX.

The court erred in holding and deciding that the plaintiff was entitled to recover notwithstanding the bond furnished by the defendant National Surety Company had reference to the contract for the construction of a two-span riveted bridge, together with three concrete piers, while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.

X.

Said court erred in rendering judgment for the plaintiff.

THE EVIDENCE.

The evidence shows that:

On December 18, 1911, Coast Bridge Company entered into a contract in writing with the County of Lincoln for the construction of a bridge across the Kootenai River at Rexford, according to certain plans and specifications which are attached to and made a part of the contract. (See Record, pages 63 to 85.)

That by the terms of the specifications the bridge was either to be constructed under Plan A (p. 70) or Plan B (p. 71). If constructed under Plan A it was to consist of two 200 foot riveted spans for superstructure resting on one concrete stream pier and two concrete shore piers, or tubular piers if so desired. The contract itself (p. 65) shows that the bridge was to be constructed according to Plan A, sheets numbers 1 and 2, and to be upon three concrete piers.

The substituted contract shown on pages 8 to 29 provides that the Bridge Company was to construct the bridge "in accordance with plans, drawings and specifications to be hereafter submitted by the Bridge Company to the County, and which said plans, drawings and specifications shall become upon acceptance by the County a part of the contract of December 18, 1911, and shall be annexed thereto and marked 'Plans for Rexford Bridge' and shall be substituted for the plans, drawings and specifications heretofore made a part of the contract of date December 18, 1911."

The substituted contract also provides that the Bridge Company upon these changed specifications is to receive additional compensation in the amount of \$3487.00.

The evidence shows that the National Surety Company executed a bond guaranteeing the faithful performance of a modification of the contract of December 18, 1911, by the Coast Bridge Company under date of December 20, 1911.

(See bond as attached to complaint, pp. 26-28.)

By the terms of the bond it is recited that the Coast Bridge Company under contract of December 18, 1911, was to construct a two-span riveted bridge over the Kootenai river at Rexford, Montana, together with three concrete piers; and it is recited that changes had been made in the original plans and specifications and a new contract had been made and entered into in accordance with which changed plans and specifications and by the terms of the contract the Coast Bridge Company was to construct a two-span riveted bridge over the Kootenai river at Rexford. This bond shown on page 29 was executed under date of December 20, 1911, and of course by its terms excludes any reference to the contract of February 5, 1912, being executed under prior date and referring to a different character of bridge to be constructed.

The evidence shows that the bridge constructed was materially different in character than the one covered by the bond of the defendant National

Surety Company, and was a 440 foot bridge and consisted of two 220 foot, pin-connected spans, resting upon one concrete pier and two tubular shore piers in place of two 200 foot riveted steel spans resting upon three concrete piers.

The evidence further shows that the location of the concrete pier was changed after the work had been started upon the bridge, in fact after the originally contemplated pier was in the course of construction and the new pier was constructed further out in the channel of the river some sixteen feet and in a more dangerous position for the pier. This change was made by the direction of the County and over the objection of the Coast Bridge Company, and upon the statement to the County by the Coast Bridge Company that if constructed at the new location it should be constructed upon the "force account" (p. 110), which would place the construction of the new pier outside of any contract.

The evidence shows that the excavation for the piers should be sunk to the elevation called for on the plans, and that after the excavation should be made to the full depth piles should be driven inside, if so ordered by the engineer (p. 23). The specifications also provide that the piles were to be cut from live trees not to be less than twelve inches at the large end nor less than nine inches at the small end, and if found necessary in driving should be shod with steel or cast iron shoes (p. 16). The contract also provided that if piling should be re-

quired under any of the piers the price to be paid for a piling should be forty cents a lineal foot, and that the length of said piling should be specified and determined by the county or its representatives.

The contract also provided that if any additional concrete should be required in the construction of the piers the County should pay \$10 per cubic yard for the concrete above water line and \$15 per cubic yard for concrete below water line; further, that if the full amount of concrete specified in the plans and specifications for the piers should not be required, the County should have the benefit of a reduction in the price for the pier at the rate of \$13 per cubic yard for the concrete below water line and \$8 per cubic yard for the concrete above water line. So that as to the amount of concrete used in the construction of the piers either more or less than that called for in the specifications and plans, and also with respect to whether piling should be used in connection with the concrete in the construction of the piers, and the length of such piling, those matters were to be determined by the County and paid for at unit prices, so that the amount required and used would determine the amount to be paid. It was not optional with the contractor to increase or decrease the cost of the bridge by increasing or decreasing the amount of concrete to be used in the piers, or by using or not using piling in the construction of the piers. It was for the contractor to do as directed in those

matters by the County (pp. 64, 65).

The evidence shows that the piling used were 22 feet in length, and were eight by eight (p. 94), and that sixty-two piling were used in the pier (p. 106), while the plan showed the location of thirty-eight piles, if piling should be required.

The evidence further shows that an eight by eight, 22 foot piling embedded four feet in the ground would sustain a weight of approximately 30,000 pounds, and that a 2000 pound hammer falling twenty feet would strike 40,000 pounds to the foot, or a total of 800,000 pounds; that the blow would be more than 400 per cent greater than the piling would stand (pp. 104, 105);—according to Carnegie “Pocket Companion” edited by Carnegie Steel Company of Pittsburgh, Pa. (1916 Edition), page 363, a round wooden pile 12 inches at each end, 22 feet long, embedded 4 feet, of white pine or tamarack, will stand a weight of 79,200 pounds.

The evidence further shows through the opinion of Mr. Kennedy, called by the County of Lincoln, that the direct cause of the collapse of the bridge was the undermining of the pier by the washing of the river (p. 96); that the piling themselves under the pier were not driven sufficiently after the underwash to support the weight of the pier (p. 96); that when the wash had proceeded to probably the center or slightly beyond the center of the pier, the pier started to dip upstream and hung in that position for some time as the

wash proceeded, and when it reached a certain angle it sheared off the piles, as Mr. McCall reported to him. The piles were sheared off of the upstream end and pulled on the downstream end, and then the pier toppled over sidewise.

Mr. Kennedy also testified that if the piling had been driven with a 2000 pound hammer falling twenty feet, so that with the last blow the piling would not penetrate to exceed one-half inch, the pier would not have toppled over (p. 97).

The witness McCall for the County, who was the diver, reporting the condition to Kennedy, stated that all except sixteen of the piling were sheared off flush with the concrete, and that sixteen were protruding out of the concrete a distance of about three feet eight inches (p. 94). Further that after the excavation was completed for the pier in question the County, through its engineer and board of commissioners, measured the hole (p. 106), and directed the Bridge Company not to put in the concrete upon finishing driving the piling until the commissioner, Mr. Geary, was notified, and that Mr. Geary, the commissioner, was notified and inspected the piles after they were driven and before the concrete was placed in the excavation over them (p. 107); further that the man in charge of erecting the bridge for the Bridge Company acted under the direction of the commissioners and county surveyor (p. 108).

Mr. Raynor, a witness for the defendant, testified that he drew the plans for the bridge and left

the matter of the depth of the excavation open, so that it could be determined when the excavation was made and when the actual conditions would be known to what extent the excavation should be made, and with respect to piling in the foundation for the piers witness testified that that matter was left open so that the County should determine when the excavation was made how many piling were to be used, if desired by the county; that is, that the County was to determine whether piling were to be used or not, and that after the excavation was made piling were to be driven if ordered by the engineer for the County. Witness further testified that if the matter of using piling under the center pier had been left to him he would not have used piling at all, but would have carried the concrete down lower, and that in his judgment the driving of piling was not practicable; that the information which he had in the drawing of the plans with respect to these matters he obtained from the County engineer of Lincoln County, and particularly from a profile prepared by that engineer (p. 103-104).

The evidence further shows that the County was to pay for the construction of the bridge contemplated by the contract of December 18, 1911, certain specified amounts at certain specified times (p. 64), providing in part that twenty-five per cent was to be paid upon the completion of the concrete piers, fifty per cent upon the arrival of the steel for the bridge at the bridge site, and

the remaining twenty-five per cent within thirty days after the completion and acceptance of the bridge. The evidence, however, shows that the County disregarded these provisions, and by resolution under date of July 26, 1912, changed the terms and conditions of the contract of December 18, 1911, in so far as the same provided for payments to the Coast Bridge Company, and provided for a payment of \$12,500, or nearly one-half the contract price, to the Coast Bridge Company before any of the work was done upon the bridge in question, in fact before any of the materials had been delivered at the bridge site (pp. 88-90), and the warrants issued by the County evidencing payment (pp. 99-102) are shown commencing July 26, 1912 a payment of \$12,500, October 21, 1912 a payment of \$2500, October 21, 1912 a payment of \$10,000, and other payments aggregating the total amount which was paid for the construction of the bridge.

Further, that under date of December 28, 1912, the board of county commissioners passed a resolution accepting the bridge in question (p. 92).

The contract, dated December 18, 1911, introduced in evidence, shows the following condition precedent (p. 66):

“It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the

same shall have been granted by the congress of the United States.”

There is no allegation in the complaint and no evidence in the case with respect to the matters contained in the above provision of the contract.

PROPOSITIONS AND AUTHORITIES RELIED UPON IN THIS APPEAL

I.

The complaint does not state a cause of action.

(a) The complaint does not allege performance of the contract sued upon by the plaintiff;

(b) The complaint does not allege a compliance with the condition precedent as to taking effect of the contract, namely, that the War Department of the United States should approve the plans and specifications prior to taking effect of the contract;

(c) There is no allegation in the complaint that the bond sued on covered the construction of the bridge in question, or guaranteed the performance of the contract of February 5, 1912;

(d) There is no allegation in the complaint that the bond company had knowledge of or consented to any changes in the contract referred to in the bond, or that the bond should cover a subsequent contract calling for a bridge of a different character than the one referred to in the contract and named in the bond.

II.

The evidence shows that there were changes made by the County in the construction of the bridge which released the surety on the bond guaranteeing the performance of the original contract:

(a) A material change in the location of the concrete pier in the stream;

(b) A material change in the length of the spans of the bridge and in the character of the spans changing from a riveted steel span to a pin connected span bridge.

III.

The evidence shows that there was a material change in the contract in the time of payments to be made the contractor, which would release the surety.

IV.

The evidence shows a want of compliance in the provision requiring the approval of the War Department of the plans and specifications as a condition precedent to contract taking effect.

V.

The evidence fails to show

That the bridge fell because of any failure on the part of the Bridge Company in the construction of the bridge according to the plans and specifications therefor; or under the direction and supervision of the plaintiff County.

VI.

The County accepted the bridge, made full payment therefor to the Bridge Company as being in

full compliance with the orders and directions of the County and the plans and specifications.

We will present our argument under the above six heads and numbers.

I.

The contract sued upon, together with the specifications which are a part thereof, show many acts which are to be performed by the county prior to and during the construction of the work. The complaint contains no allegation of performance on the part of the county at all, except it is alleged that certain payments were made by the county, and it is shown that the contract of Dec. 18, 1911, which is the only one upon which plaintiff in error was surety (page 66), by its terms was not to become a contract until the War Department of the United States had approved the plans and specifications and given authority for the construction of the bridge. There is no allegation that this was ever done. We take it that it is elementary that a person declaring upon a contract must show first, the defendant is in default, and second, that the plaintiff has performed or tendered performance. That is, that the plaintiff has performed or facts excusing such plea of performance.

There is nothing in the statutes of Montana which changes these rules of law. It is provided in Section 6572, Revised Codes of Montana 1907, being section 746 of the Code of Civil Procedure:

“In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the fact showing such performance.”

The complaint does not in any respect comply with this section. There is no excuse or justification that this allegation be omitted. The contract specifically states that it is not to become a contract until certain things happen.

In 9 Cyc., page 700, it is said:

“If a party undertake that a condition shall be performed by a stranger and the latter refuses, this is no excuse unless such refusal be procured by the other party. That an obligation to pay money may be dependent upon the action of a third person over whom neither party has any control, and that payment cannot be exacted unless the specified act is performed, is familiar law.”

Within the foregoing rule it would seem to be apparent that the failure to allege that the War Department had approved the plans and specifications and granted permission for the construction of the bridge, would render the plaintiff without standing in this case. Moreover, the complaint alleges the making of a contract on the 18th day of December, 1911, the changing and altering thereof during the month of February, 1912, and at the outset of the trial plaintiff amended to allege a contract made on the 18th day of December, 1911, and the modification thereof on the 5th day of

February, 1912. The complaint alleges that by the changed and altered contract, Coast Bridge Company was to do certain things and that the Coast Bridge Company did not do these things. It does not allege that by the original contract the Coast Bridge Company was to do certain things and failed to do them, so that the only allegation of breach on the part of Coast Bridge Company is in regard to the contract of February 5, 1912. The bond upon which suit is brought is dated the 20th day of December, 1911, and refers to a contract made on the 18th day of December, 1911, and certain changes made thereto, and it is obvious that a bond executed on the 20th day of December, 1911, would have no reference to a changed or new contract made on the 5th day of February following. Moreover, there is no allegation that National Surety Company executed any bond to cover the new contract of February 5, 1912, which it is claimed Coast Bridge Company breached. Quite the contrary, it is alleged on page 4 of the record, paragraph 6 of the complaint, "That on the 18th day of December, 1911, in consideration of the said contract above mentioned the said defendant, Coast Bridge Company, and the said defendant, National Surety Company, made, executed and delivered to the said County of Lincoln their obligation, etc." It seems to us that the plaintiff suing because of the breach of a changed and altered contract dated February 5, 1912, cannot hope to hold the Surety Company who had

nothing whatever to do with that contract and whom the complaint alleges executed a bond to cover a contract dated the 18th day of December, 1911. We take it that a reading of the complaint will show no allegation of a respect in which plaintiff claims that Coast Bridge Company breached the contract of December 18, 1911. This being true, it follows that no cause of action is stated against National Surety Company because National Surety Company, as shown by the bond and as specifically alleged in the complaint, had nothing to do with a contract made on the 5th day of February, 1912. Furthermore, even if it could be claimed by any possible stretch of imagination that National Surety Company was concerned with a contract made on the 5th day of February, 1912, still the complaint alleges, as construed with Exhibit "A" attached thereto (p. 8) that the County had decided to alter the dimensions of the bridge referred to in the contract of December 18, 1911, and increase its length. These alterations, extensions and enlargements are to be made in accordance with specifications and plans thereafter to be agreed upon between the parties, and the county agrees to pay the Bridge Company in consideration of these alterations, extensions and enlargements the sum of \$3487.00 in addition to the amount named in the contract of December 18, 1911. With all these changes, with the definiteness of the contract of the Surety Company, dated December 18, 1911, entirely dissipated and a new one which was

thereafter to be agreed upon between the parties substituted in its place, the complaint does not contain the faintest suggestion that the Surety Company knew anything about these alterations, extensions and enlargements which were to be made according to plans thereafter to be agreed upon. It seems to us that if a surety can be held to have guaranteed any sort of an indefinite contract which parties might thereafter agree upon, when the surety had originally guaranteed a definite, certain contract, that there is no limit to the surety's liability—they could be held for anything. If a surety signed a bond in a county one year, he could be brought to a realization in later years that his liability had been extended to other contracts covering liabilities which were not in the contemplation of any parties when he gave his bond, and of the existence of which the surety had not the least suspicion. While we understand that suretyship is a hazardous undertaking, still we do not believe that a case can be found anywhere that will hold a surety or any other party to the performance of a contract which it is not even claimed that he knew about, much less was a party to. The thought we urge here is brought out in **United States vs. Weisberger**, decided by this Court August 4, 1913, reported in **206 Federal 641**, an action in which United States of America sought to hold a surety because of the additional cost to it of completing a contract in a substantially different manner than the Surety Company's principal had agreed to execute the work. It is said:

“To hold him or his surety liable for the excess of cost of substantially different work would clearly be to hold them liable for something for which they did not bind themselves and the cost of which they might have no means of determining.”

II.

The evidence shows that there were changes by the County in the construction of the bridge which released the surety on the bond:

(a) There was a material change in the location of the concrete pier, in that it was moved some sixteen feet further out into the stream where it was more subject to dangers from the wash by the stream at the foundation;

(b) There was a material change in the length of the spans increasing the length from 200 to 220 feet for each of the spans, thereby increasing the weight which would rest upon the center pier, and there was a material change in the character of the spans, changing the bridge from a two span riveted bridge to a two span link connected bridge.

It is our contention that these material changes and departures from the contract of December 18, 1911, without the knowledge or consent of the bond company would release the bond company, and particularly in view of the fact that the plaintiff sought to show that the bridge fell because the pier was undermined by the wash of the river to such an extent that the piling in the foundation of the pier failed to support the pier and the bridge fell. The fact is conceded that the pier was moved

out into the stream some sixteen feet where it was more subject to the wash of the river than at the location specified in the plans for the bridge. In other words, the County caused the pier to be moved out to a point in the river where the wash at the foundation of the pier would be greater than at the location fixed in the original plans and the complaint in this action. Because the river did wash under the concrete in the foundation of the pier and caused the pier to fall, there is a direct connection between the cause of the pier falling and the location of the pier as shown by the evidence and the allegations of plaintiff's complaint. The relocation of the pier was without the knowledge or consent of the bond company. The hazard of the bond company's undertaking was increased by the act of the County, and the cause of the failure of the bridge is due to the falling of the pier which was undermined in its new location where it had been placed by the County without the approval or consent of the bond company.

Further, the weight resting upon the pier was greatly increased by the lengthening of the spans from 200 feet to 220 feet, or adding 40 feet of superstructure, which was to rest upon the center pier. The increased weight, according to the testimony, would have to do with the failure of the foundation under the pier to sustain the load. The plaintiff alleged and sought to show that the piling in the foundation was not sufficient to carry the weight of the pier and the bridge, so that the in-

creasing of the weight by adding 40 feet to the spans which would rest upon the center pier had materially to do with the weight of the span resting upon the pier and with the falling of the pier.

The evidence shows the further material change. In the original plan, and in the modified plans referred to in the bond under date of December 20, 1911, the bridge was to consist of two riveted steel spans, while the bridge constructed under the direction of the County was a two-span link connected bridge. The riveted steel span bridge would have been firmer in place and would have tended to sustain the pier in its proper position, whereas the link connected span would buckle under any end pressure and would not resist the weight of the pier.

In *United States v. Freel*, 186 U. S. 309, 46 L. Ed. 1177, in the syllabus, the court say:

“The surety on a contractor’s bond conditioned for the performance of a contract to construct a drydock was released by a change made by the contracting parties without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary.

“The objection that the surety should have set up as an affirmative defense by plea or answer and not by demurrer, the fact that

such changes were made in the principal's contract as would release the surety if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained."

In this case, the provisions of the contract authorizing changes and alterations or modifications in the construction of the dry dock were set out and are more comprehensive than the provisions in the contract of December 18, 1911, in the case at bar. In the *Freel* case the court will note from an examination of the opinion that two changes were made, each of which is covered by a written contract signed by the principals to the original contract which had been guaranteed by the surety. The first modification provided for an increase in the length of the dock from 600 to 670 feet, and provided for an increased compensation in the amount of \$45,556 for the increase in the length of the pier; the second modification of the original contract was made by written agreement between the principals to the original contract providing that the pier should be located 64 feet nearer land than the original location, and provided for additional compensation in amount of \$5063.18, and extended the time some eight weeks for the construction under the new conditions. The principal in the bond partially completed the dock, but because of delay in the construction the government

took the work over and completed it and sued the principal and his bondsman. The surety on the bond defended on the ground that he was released by reason of the modifications in the original contract which were made without his consent or approval.

The circuit court of appeals in considering the case held that there was a change in the substance of the contract not contemplated thereby which released the sureties on the contractor's bond who did not assent thereto from liability (99 Fed. 237).

The Supreme Court in reviewing the judgment of the Circuit Court of Appeals in the opinion say:

“Coming then to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17th, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance.”
And further:

“The further contention is made in the government's brief that, even if substantial changes were made under the contract as would release the surety, being made without his assent, the fact of such changes should

have been set up by the defendant as affirmative defense, by answer or plea, and not by demurrer.

“The declaration set out, by attaching them as exhibits, the original and the two supplemental contracts, and it is alleged that the changes affected by the latter were made in pursuance of and in conformity with paragraph seven of the first contract. If upon the face of the agreement of August 17, 1893, it appears that substantial changes were made in the location of the proposed structure, requiring additional excavation and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock, for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost, and time necessary for the completion of the work, operated to release the surety, if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto.”

In **American Bonding Co. v. United States**, 167 Fed. 910, decided February 1, 1909, by this Court, in the opinion this Court says:

“The recent case of *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, is more in point, and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of

the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock——

‘to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part.’

“The seventh paragraph of the contract provided (substantially as in the contract before the court) that:

“ ‘If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract.’

“It was further provided:

“ ‘That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract.’

“It was further provided:

“ ‘That no change herein provided for shall in any manner affect the validity of this contract.’

“A supplemental contract in writing was entered into between the contractor and the Chief of Yards and Docks, providing that the location of the dry dock should be——

‘one sixty-four (164) feet further inland than laid down and staked out when the said contract was entered into.’

“This supplemental contract provided full

compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplemental contract, but so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans, and specifications, at a cost to the United States of the sum of \$370,000. The sum of \$72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damages alleged. The sureties interposed a demurrer, on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on behalf of the United States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the

contract was affirmed by the Supreme Court, which, after citing authorities relating to the liabilities of sureties, said:

“The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. *United States v. Freel* (C. C.), 92 Fed. 299.’

“It will be observed that, unlike the case before this court, the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but, like the present case, the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change, so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case, that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the con-

tract, the surety is not liable, and if a change is made in the contract without his consent his liability is at an end, even though it may appear that the change is for his benefit."

III.

The evidence shows that there was a material change in the contract in the time of payment to be made the contractor, which would release the surety:

(a) The evidence shows that \$12,500 was paid the contractor in advance of doing any work upon the bridge in question (p. 99);

(b) The evidence shows that by resolution the County purported to modify or change the terms of the contract as to the time of payment (see p. 89), and not only provided for the \$12,500 advance payment, but paid an additional \$12,500 on the bridge by the 21st of October (p. 100), so that before the pier was constructed \$25,000 had been paid the contractor contrary to the terms of the original contract but in conformity to a resolution purporting to amend the terms of the original contract passed in July, 1912, modifying and changing the time and terms for payment, but which was without the knowledge or consent of the surety, and it is shown by the evidence that all payments were made prior to times fixed in the contract, in fact the plaintiff's attorneys concede this to be true, and in this situation the surety was released from further liability under the bond.

In First National Bank of Montgomery v. Fi-

delity & Deposit Company of Maryland (Ala.), 40 So. 415, in the syllabus it is said:

“Making payments before they are due under the terms of a building contract will release a surety on the contractor’s bond.”

In the opinion it is stated:

“It is a maxim of law that all parties, whether principal or surety, who reduce their contracts to writing have a right to insist upon the terms of the contract as written; and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party and is therefore entitled to the enforcement of the contract. When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts are made at the same time. The surety’s bond recites that, whereas the building contract has been made, etc. Then, in the absence of any explicit declaration to that effect it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and in this country, and the trend of the best authorities so evident, that it seems useless to go over the arguments of the courts.

“The leading case in England is that of *Calvert v. London Dock Company*, 2 Keen 638. And the Supreme Court of the United

States, in an able opinion by Justice White in which he reviews the decision of that court and others, plants itself squarely on the English doctrine, declaring that 'The rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement with reference to which he entered into his contract of suretyship, and to exact strict compliance with its stipulations.' *Prairie State National Bank v. United States*, 164 U. S. 227.

"Equally emphatic are the cases of *Simonson v. Thori*, 36 Minn. 439, 31 N. W. 861; *United States v. American Bonding & T. Co.*, 89 Fed. 925; *Backus v. Archer* (Mich.), 67 N. W. 913, and cases cited. * * *

"The cases referred to by appellant's counsel which hold that, where a collateral security has been released, or lost, without the consent or fault of the surety, said surety is released only *pro tanto*, do not apply to a case like this even as to the ten per cent reserve. Said provision in this case is one of the conditions of the contract, and it cannot be said that it is a mere security for the payment of such money, but it is reserved as much as a stimulus to insure the completion of the work by the contractor, as for a mere security of the amount of money."

In *Taylor v. Jeter*, 23 Mo. 244, it was held that sureties upon a similar contractor's bond had a right to stand upon the agreement that the owner would not pay the contractor during the progress of the work more than seventy per cent of the value of the work done; and if he did pay more without the consent of the sureties, they were thereby discharged. And this decision is cited

with approval and followed by **Evans v. Garden**, 125 Mo. 72, 28 S. W. 439, **Ryan v. Morton**, 65 Texas 258.

In **Welch v. Hubschmitt Bldg. & Wood Working Co.**, 61 N. J. Law 57, 38 Atl. 824, it was held that, by paying a part of the second installment to the contractor before it was due under the contract, the owner discharged the surety from all obligation; and to the same effect, **St. Mary's College v. Meagher** (Ky.), 11 S. W. 608.

In **Wehrung v. Benham** (Or.), 71 Pac. 133, it was held that the sureties were released where the owner paid for all the work as it progressed, while the contract provided that 25 per cent of the amount due was to be retained for thirty days after completion of the work.

And in **Cowdery v. Hahn** (Wis.), 81 N. W. 882, it was held that payment in full by the owner before the building was completed worked as an absolute release to the sureties upon the contractor's bond.

In the case of **Tuohy v. Woods** (Cal.), 55 Pac. 683, the court said:

"When a surety has shown that the contract to which he became a surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other party to show that the surety has consented to the new contract."

In the case of **Barret-Hicks Co. v. Glas** (Cal.), 99 Pac. 856, the court said:

“It is well settled law that a surety may stand upon the strict letter of his bond, and that where a principal has, without the consent of the surety, materially violated the terms of an agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has guaranteed the faithful performance of building contracts.”

In the late case of **Dunne Inv. Co. v. Surety Co. et al**, 150 Pac. 411, the Supreme Court of California said:

“A surety is exonerated in like manner with a guarantor, for section 2840 of the Civil Code so expressly provides, and a guarantor is exonerated, except in so far as he may be indemnified by the principal, ‘if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal, in respect thereto, in any way impaired or suspended.’ Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or suspended it is thoroughly settled by our decisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby.”

In the case of **Reese v. United States**, 9 Wall. 13, 19 L. Ed. 541, the court, in discussing the liability of sureties, said:

“Any change in the contract, on which they are sureties, made by the principal parties, to-wit, without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in

its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

The Circuit Court of Appeals for the Eighth Circuit in the case of **National Surety Co. v. Long**, 125 Fed. 887, in an opinion by Circuit Judge Sanborn, said:

"Moreover, it is not indispensable to the validity or to the enforcement of this plain covenant of the obligee—this condition precedent to the liability of the defendant under the bond—that the latter should show that it has sustained injury from the failure to fulfill it. Parties to agreements have the right and the power to contract that things immaterial as well as things material shall be the subject of their warranties, or of conditions precedent to their respective liabilities, and their contracts in the one case are as legal and binding as in the other. The all-sufficient, the conclusive, answer to the suggestion that the subject of the warranty or of the condition precedent is immaterial, and its breach without effect, is that the parties had the right to agree and they have contracted otherwise. The immateriality of a warranty or of a condition precedent made by the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of the failure prescribed by their contract."

In the case of **Coughran v. Bigelow**, 164 U. S. 301, 41 L. Ed. 442, which involved the question of liability of sureties on a bond conditioned for the performance by the principals of the terms of

a contract for the sale of land, the court in the opinion said:

“The solution of the difficulty thus created will be found by reading the bond in the light of the contract, to secure the performance of which was the purpose of the bond. The contract provided, indeed, that the vendors should execute and deliver a proper deed, but also provided that the title should not pass until the deferred payments were made. To construe the bond as compelling a conveyance before such payments were made would deprive the vendors of the security given them by retaining the title, and also of their stipulated right to forfeit the cash payment and rescind the sale, if the payments were not made as provided in the contract.

“The obligatory portion of the bond was expressly made dependent on the proviso that Coughran and Cottrell should comply with their portion of the contract that day made and a copy of which was attached, one of terms of which was that the sum of \$3,334 should be paid on October 1, 1890. This payment was not so made on that day. The acceptance by the vendors of the payment subsequently made, on or about October 12, was, of course, a waiver by them of their right to rescind and declare a forfeiture, but such waiver did not bind the sureties, who were relieved from liability by the failure of the vendees to perform the precedent act of payment at the time provided in the contract.”

IV.

On page 66 of the record it is shown that in the contract of December 18, 1911 that the parties agreed that the contract should not become effective until the War Department had approved the

plans and specifications and granted permission for the construction of the bridge. We think that the evidence clearly shows that the bridge contemplated in this contract of December 18, 1911 was in fact never constructed, which, of course, would do away with the necessity of any approval of the plans and specifications therefor or any permission for its construction. However, without regard to the sufficiency of our contention that the plans and specifications of the bridge referred to in the contract of December 18, 1911 were not in fact the specifications finally used for the bridge finally built, still we urge upon Your Honors that parties competent to contract may agree between themselves that a writing shall not become effective as a contract until the happening of some contingency. We submit to you that the parties did make such an agreement here. In other words, the writing is a conditional contract and to become a contract and to render parties liable thereon only if the War Department of the United States thinks that it is proper to construct a bridge at this particular place, and that the plans and specifications tendered are sufficient for that purpose. Your Honors can readily see a substantial reason why a surety would be willing to guarantee the performance of a contract where all of its terms had previously been passed upon by expert, disinterested engineers, when the surety might not be willing to guarantee the same contract if it was not to be passed upon by the expert, disinterested engineers.

The County was interested in getting as much for its money as it could. The contractor, of course, was interested in getting as much for the work performed as he could. The surety is interested in the subject matter concerning which the County on the one side and the contractor on the other are bargaining, and in this situation the surety says "I will guarantee that a bridge constructed in accordance with these plans will be a good bridge provided a disinterested engineer, to-wit, the engineers of the War Department approve them for use at the specified location." We take it that if the surety is to be held for the insufficiency of a bridge, which is claimed to have been placed within the purview of his obligation, that it must be shown that the bridge concerning which suit is brought is a bridge erected according to plans previously approved by the War Department. The contractor and the County might make a number of agreements between themselves as to different bridges but it is manifest that in order to hold a surety he must be sued concerning a bridge which was erected under the conditions solemnly agreed upon in his contract. The evidence not only does not show that the War Department ever approved these plans and specifications, but on the contrary it shows that these plans and specifications were never used, and it is further shown by the undisputed testimony of Mr. R. A. McClayn (p. 105) that during the progress of the work Mr. Geary, acting for the County, had the pier, which finally

went out, placed sixteen feet nearer the Rexford side, and which is shown on page 106 of the record to have placed the pier ten feet further out in the center of the river, thus giving the river a bigger sweep at the pier, and this same witness McClayn's uncontradicted testimony (p. 105), "No change was made in the plans." So you see that not only the plans that the Surety company contracting concerning were never used, but after others were used, they were not approved by the War Department; and above all the County at least acquiesced in the construction of this pier different from any plan, so that in addition to having no evidence in the record that the plans were approved by the War Department, you have an affirmative showing that the plan of the bridge as constructed and particularly as to the center pier, was never written out, which makes it conclusive that the plan actually followed could not have been submitted to the War Department. There is no claim that this change was made by the Bridge Company fraudulently or without the consent of the county, but on the contrary the entire record shows that the county insisted upon these changes notwithstanding this plan, and that the Coast Bridge Company instructed its construction foreman (pp. 109 and 110) that he had authority only on behalf of the Bridge Company to make this change if the County by written instructions ordered its construction under force account. In other words, the Bridge Company took the square position—and its con-

struction foreman had no authority to take any other—that it would not agree to the construction of this pier in a manner different than shown upon the changed plan. We contend that this testimony makes an affirmative showing of a substantial default on the part of the County and substantial injury to the Surety thereby.

The provision to the effect that the contract shall not become effective until the plans and specifications are approved by the War Department is not unlike provisions so frequently found that payment shall not be due until certified by engineer or architect, and in **McGlaulin v. Wormser**, 72 Pac. 428, the Supreme Court of Montana with regard to this sort of provision say:

“The action is based upon a written contract entered into between the parties for the construction of a dwelling house. It provides that ‘all payments shall be made upon the written certificates of the architect to the effect that such payments have become due.’ It also provides that the different payments shall be made when certain work about the building is completed, and that the final payment shall be due ‘when the entire work is completed and accepted.’ By the terms of this contract, under the law, the obtaining and presentation of a certificate of the architect was a condition precedent to the final payment on the contract becoming due. Therefore the complaint must state that such certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact. We find no allegation in the complaint to that effect. This being true, it is not sufficient to

support the judgment given by the court below. The motion for nonsuit made by the defendant should have been sustained upon this ground. *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Hudson v. McCartney*, 33 Wis. 331; *Hanley v. Walker*, 8 L. R. A. 207; *Byrne v. Sisters of St. Elizabeth*, 45 N. J. Law, 213; *Beharrell v. Quimby*, 162 Mass. 671, 39 N. E. 407; *Cox v. McLaughlin*, 63 Cal. 196; *Schmidt v. North Yakima (Wash.)*, 40 Pac. 790."

V.

There is no evidence in the record upon which it can be said that a default of the Bridge Company caused the collapse of the bridge. It is claimed that the bridge fell because of the insufficiency of the piling. Assuming that the specifications (p. 11 to 25) said to be the specifications referred to in the contract of February 5, 1912 are controlling. The reference to the piles is found on page 23 of the record. It is said:

"After excavation is made to the full depth, piles shall be driven inside, if so ordered by the engineer."

"The Piers and Abutments shall be sunk to the elevation called for on the plans."
(Page 24 of the record:)

"All piles shall be as called for under specifications and shall be of the length called for on the plans or of a length necessary to fulfill the following specification as to driving:

Piles shall be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast iron shoes and properly ringed at the top with a

wrought iron ring, to prevent their splitting or brooming. All piles which are broken, split or badly broomed and in the opinion of the engineer are not satisfactory, must be withdrawn and replaced by other piles to the satisfaction of the engineer or inspector in charge. (Page 16 of the record:)

“Piles are to be cut from live trees, and not to be less than 12 inches at the large end and not less than 9 inches at the small end. They shall be stripped from all bark; be straight and sound and free from wind shakes. If found necessary in driving, all piles shall be shod with steel or cast iron shoes to prevent their splitting or crushing under rapid blows of the hammer.”

In the contract of December 18, 1911 it is said (p. 65):

“Length of such piling shall be specified and determined by the County or its representative.”

From the foregoing it is seen that the depth of the excavation from the piers is determined by reference to the plans.

Witness Raynor (p. 103) testified that he drew the plans and did not indicate thereon how deep the excavation was to go but left that open to be determined when the excavation was being made so that the County could determine this and also could determine whether it desired any piles to be driven.

It will be noted that whether or not there were to be any piles driven was left to the County, and their length is specifically left to the County. It

is thus seen that the entire matter of the piles and their sufficiency is left to the County.

It is shown by the record that the County's officer, Mr. Duthie, County Engineer, measured the excavation when it was completed, and that Mr. Geary, one of the County Commissioners, inspected the piles after they were driven and knew their dimensions.

We contend that the County, having the authority to make a decision as to whether or not and what piles should be driven, thereby assumed the responsibility of the exercise of their judgment in allowing piles to be driven of which they had full charge and full knowledge. Moreover, it is shown by the testimony of the diver who made the examination for the plaintiff that all except sixteen of the piles had sheared off at the bottom flush with the concrete, and that sixteen were protruding out from the concrete a distance of about three feet eight inches. It certainly must be said that as to the piling which sheared off, the complaint of the plaintiff that they had not been driven sufficiently deep must be disregarded because no matter how deep they would have been all they could have done would have been to shear off. It is shown that sixty-two piles were driven beneath this center pier and with all but sixteen shearing off, it seems to us that it is nothing but the rankest sort of conjecture for the witness Kennedy to attempt to make a case for the plaintiff by giving it as his opinion that the pier would not have toppled over

if the piling had been driven to a point where with a blow of a 2000 lb. hammer falling twenty feet the penetration would not have exceeded one-half inch. The testimony is undisputed to the effect that with piling used of the size here—which size was fixed with the knowledge of the plaintiff—it would have been impossible to strike them with a 2000 lb. hammer falling twenty feet, as the blow would be about 400 per cent more than the ultimate strength of the piles. It should be carefully noted that there is not a scintilla of evidence that the particular piling which were driven could have been driven in a different manner than they were driven. The plaintiff makes no complaint about the size of these particular piling, and in fact it could not because they were used with its knowledge and it had the right to say whether or not they should be used. Plaintiff complains about the 2000 lb. hammer falling twenty feet and the amount of penetration upon the last blow only.

The witnesses for the defendant testified that piling should not have been used at this place, that instead the County should have exercised its option to have the concrete extended down lower. It should be borne in mind that the County had the right to say how deep the concrete should go and whether or not any piling should be used. All the witnesses agree that the wash below the concrete was the primary cause for the undermining and the consequent falling of the pier. This demonstrates that if the concrete had been carried down

below the wash of the river that the pier would not have been undermined. This is not based upon conjecture but upon physical facts which any one would know and also is borne out by the fact that all the engineers, both for plaintiff and defendant, agree that until there is an under-wash there is no undermining, and, if no undermining, no collapse of the pier. The Bridge Company had no right to say whether concrete should go down further or whether piling should be used instead, but it was a matter for the County to say. The Bridge Company's plans and the specifications placed the limit upon the authority of its construction foreman, and he had authority on behalf of the Bridge Company only to follow these plans and specifications except that if the County exercised its right, which it had, to substitute either piling for concrete or vice versa, that he was to follow their directions. The plaintiff cannot be heard to say that it relied upon the construction foreman because it had knowledge of the recitals in the specifications leaving these matters to the County, and it likewise had knowledge that the Bridge Company in sending out the foreman under these specifications had sent this foreman for the sole purpose of following out these specifications; and if the County wanted the foreman to make decisions for them in face of knowledge of the limitations of his authority on behalf of the Bridge Company, it seems to us that it must be said that even then the County must take the responsibility for the

exercise of judgment by the construction foreman. Upon this we contend, however, that the County is shown by the evidence to have knowledge of the piling driven and thereby to have exercised itself directly the discretion given it.

Your Honors in determining this matter should have in mind the situation at the site when this work was progressing. Here you have the County authorized to proceed in one of two ways—the Bridge Company absolutely subject to its directions—the County exercises its discretion in certain matters; it now seeks to have the Bridge Company and its surety guarantee the exercise of judgment thus made by the County. You may well know that if at the time that the County had made its decision as to this pier and the using of piling, that if it had wired the Bridge Company or any of its responsible officers that they expected the Bridge Company to guarantee results, that the Bridge Company would promptly have refused to do it. Still, the County at this time seeks to place the Bridge Company and its Surety in precisely that position.

We contend that it is contrary to anything contemplated by the parties in the contract or to anything contemplated by the parties when this bridge was being constructed. If the Bridge Company had expected to take the responsibility for the decision as to carrying down the concrete, or the placing of the piles, it is shown to have skilled engineers in its offices in Portland, and certainly it

would have used this discretion by its engineers. The fact that it did not and the fact that the County had the right to do so ought to be a sufficient answer as to who was supposed to take the responsibility for a decision as to the manner of the construction of these piers.

Under similar circumstances this Court held in **Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co.**, 208 Fed. 976, that a contractor was not responsible for defects in the work where he did the same in pursuance to discretion exercised by the opposite party, and it is said (page 979):

“There is evidence tending to prove that the dam was improperly constructed and in a manner different in some respects from that which was provided in the contract. * * * * No complaint is made of the core or of the material or method of its construction, but it is urged that the material for the embankment was neither deposited in place nor properly puddled in the manner prescribed in the contract. * * * * Undoubtedly a portion of the loose material was handled and deposited in a manner different from that which was prescribed in the specifications, and probably such deviation from the prescribed method contributed in some degree to the inefficiency of the dam. But however that may be, the evidence is that all that was done by the construction company was done with the knowledge and approval of the engineering company under whose supervision, according to the terms of the contract, the work was to be done.”

VI.

At various places through the specifications it will be seen that duties are placed upon the County to exercise its judgment and make decisions on the work, and likewise there are references to its inspectors.

It is shown that the entire bridge was completed, payment therefor made, and it stood some months before being destroyed. In the complaint filed, Your Honors will note that the County takes the position that it neither had knowledge of these defects nor means of knowledge. We take it that the attorneys for the plaintiff advisedly took this position, as it is elementary that if the means of knowledge were open to them, this is the equivalent of actual knowledge upon their part. There is no claim in the complaint of any effort on the part of the Bridge Company to prevent them from obtaining all the information which they desired. On the contrary, by the specifications they are given, not only the right but the duty to know what is being done.

It seems to us very clear that the County by accepting this work, and making payments of its money, cannot by any allegations of its complaint offer claim that it did not have means of knowledge when the specifications specifically give it that means of knowledge and no action on the part of the Bridge Company is alleged which prevented it from obtaining that knowledge. The

complaint further alleges that the plaintiff could not by the exercise of reasonable or any diligence discover or know of the claimed defects, yet the specifications which they rely upon specifically give them the means of having all knowledge. Because the principle involved is by the complaint conceded, and the rules of law covering it elementary, we content ourselves with the citation of **Section 359 of Vol. 6, Ruling Case Law** to the effect:

“Where work is accepted with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance. Ordinarily where a building has been accepted by the architect and the owner, it cannot, in the absence of fraud or mistake, be shown that the work was not performed according to the contract.”

Bearing in mind the fact that the specifications specifically give the County not only the right to inspect but the duty to make the decision with regard to what is now claimed to be a defect, we think it should be very clear that the effect of this acceptance be binding upon the County in the absence of any issue being tendered in the complaint as to the Bridge Company fraudulently preventing the County from exercising the rights given it under the contract.

CONCLUSION

We submit that judgment should be reversed and the action dismissed.

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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

NATIONAL SURETY COMPANY,
a corporation,
Plaintiff,
vs.
COUNTY OF LINCOLN,
Defendant.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District
Court of the District of Montana.

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Filed

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F. D. Monckton,
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STATEMENT OF THE CASE.

There are a number of inaccuracies in that portion of the brief of the plaintiff in error under the sub-title "The Evidence" pages 9-17 and we will briefly call attention to the main points in as to which we care to controvert the statement. At this time we call the attention of the court to the opinion of the trial court as a fair statement to the facts in the case (record 120-126).

On page 11 of their brief referring to the change of the location of the center pier plaintiffs in error say "this change was made by the direction of the county and over the objection of the Coast Bridge Co., and upon the statement to the county by the Coast Bridge Co. that if constructed at the new location it should be constructed upon the 'force account.' "

There is no evidence in the record that the change was made by the direction of the "County" nor is there any evidence in the record to the effect that it was made "upon the statement to the county to the Coast Bridge Co. that if constructed at the new location it should be constructed upon the 'force account' ". The record shows according to the testimony of the witness Mc Clane (page 103-109) that the change was suggested to him by Mr. Geary that he, Mr. McClane then telegraphed the Bridge Co. concerning Mr. Geary's request and received a telegraphic message from the Co. to the effect that if

the Board insisted to get written instructions and proceed on force account (record pages 109-110).

There is no evidence that the Board insisted nor is there any evidence that the Board at any time even as much as suggested or countenanced the change. It is to be noted also that there was no statement by the Bridge Co. to the County that if the change was made it was to be made on force account. All reference to the change and to the matter of force account are contained in the telegraphic communications between the Bridge Co. and its superintendent in charge and there is no evidence that these messages were communicated to the County or any of its Commissioners. Mr. Geary, one of the County Commissioners at page 112 testified that he called the attention of the superintendent to the fact that he was not constructing the Bridge according to Mr. Whitlock's wishes, Mr. Whitlock being a member of the Coast Bridge Co.

On page 12 of their brief Counsel refer to the clause in the contract providing that if additional concrete should be required in the construction of the pier the county should pay according to a certain scale and that if the full amount of concrete specified should not be required the County should have the benefit of the reduction in price at the rate of \$13 per cubic yard, and say in this connection "it was not optional with the contractor to increase or decrease the cost of the bridge by increasing or decreasing the amount of concrete to be used in the bridge or by using or not using piling in the con-

struction of the piers. It was for the contractor to do as directed in those matters by the County.” The specifications, page 23, provides that the piers and abutments should be sunk to the elevation called for in the plans; that they shall be made within a timber cofferdam or by any other means that the contractor might see fit to use in order to reach the desired depth and to *conform to the dimensions shown on the plans of these foundations*. The specifications, same page also provide that after excavation is made to the full depth, piles shall be driven inside if so ordered by the “Engineer.”

From the foregoing it will be seen that the County had no direction or control over the matter, but the matter of constructing the pier and the option as to piling were both left to the Bridge Co.

Under the laws of Montana there is no such an official as a County Engineer nor is there any law authorizing a Board of Commissioners to supervise the construction of a bridge.

The limit of the powers of the Board in this respect is to enter into the contract, exact the bond or undertaking for the faithful performance of the contract and to inspect the bridge after completion and before payment.

Section 1387 Revised Codes of Montana, limits the power of the Board in this respect and is as follows: “The Board of County Commissioners, may by order, direct the County Surveyor, or any member of said Board, or both the County Sur-

veyor and any member of said Board, to inspect the condition of any high-way or bridge in the County, and the work done thereon, and before payment therefor”.

The only “engineer” referred to in the record is Mr. C. W. Raynor who testifies that he was chief engineer of the Coast Bridge Co. at and prior to the construction of the bridge at Rexford.

He drew the plans, and everything regarding the job went through his hands, and during a part of the time he was on the grounds or as he put it, “on the job”. See Record 103. It is true that some of the witnesses for plaintiff in error speak of the “County Engineer”, but the term is used loosely and unadvisedly, for instance, Mr. Reynor on page 104, testified that he obtained certain information from the “County Engineer of Lincoln County” as before suggested this Court knows as a matter of law that there is no such a person as County Engineer, under the laws of Montana. On page 13 of their brief Counsel referred to Carnegie’s “pocket companion” and gives the resisting power of White pine and tamarack piles. This book was not introduced in evidence and the information set forth in the plaintiff’s brief is no part in the record.

On page 14 of their brief Counsel say that after the excavation was completed for the pier in question “*the County, through its engineer and Board of County Commissioners*” measured the hole and directed the Bridge Company not to put in the concrete after the piling were driven until Commis-

sioner Geary was notified and that Mr. Geary was notified and inspected the piling the concrete was placed, in the same paragraph Counsel say that the man erecting the bridge acted under the direction of the County Commissioners and County Surveyor. It is to be noted that Mr. Duthie the County Surveyor who seems to have visited the site of the bridge, once, and once only, is referred to by the Surety's Company's witnesses in some places as the County, Surveyor and in others as the County Engineer, but whatever Mr. Duthies official title might have been we must take issue with Counsel as to the evidence above set forth.

The witness McClane testified (page 106) first that Mr. Pratt probably measured the hole, he then changed his testimony and said it was Mr. Duthie. There is no evidence that any of the other Commissioners were present at that time and there is no evidence that the Commissioner present or the Board of Commissioners or any Commissioner instructed or directed the Bridge Co. not to put in the concrete. On page 107, however, Mr. McClane testified that Mr. Geary at some uncertain time told him not to place the concrete until he, Mr. Greary, had been notified, and that he subsequently did notify him.

On page 128 the witness testified that the floor was lowered 3 ft. below the elevation shown on the plans and that this change was made in obedience to a letter received from Mr. Whitlock, President of the Bridge Company. It is true also that Mr.

McClane testified that he was to follow Mr. Geary's instructions but the witness limits the authority to instruct just to one matter, see top of page 108. And it is to be noted also that Mr. McClane did not follow Mr. Geary's instructions in any matter except to notify him when the driving of the piling was completed. In all other matters he looked to the Coast Bridge Co. for instructions. The witness Paul D. Pratt, chairman of the Board of County Commissioners, testified on page 97, "that the Coast Bridge Co. had represented to us that they were competent Engineers, Competent construction engineers, and that if pilings were necessary they would so advise us and that if it was necessary to drive pilings they would drive them. We relied on their judgment and allowed them to proceed with the construction of the pier in the manner which we thought was dictated by their best judgment." He also testified that Mr. Duthie had "not so much to work during construction, as he did during preliminary stages to the location of the bridge and the data in making designs" page 98. Mr. Pratt further testified that the Board did not direct any individual member of the Board to supervise the construction of the bridge nor did the Board or the members of the Board direct the County Surveyor to supervise such construction pp. 98-99.

Counsel calls attention to the testimony of Mr. Raynor to the effect that if the matter of driving the piling were left to him he would not have driven piling at all. The testimony of Mr. Pratt is un-

contradicted and undisputed, and if the members of the Coast Bridge Co. preferred to use their own judgment with reference to driving the piling rather than to consult their Chief Engineer in that respect, the County is not to blame nor can Mr. Raynor shift responsibility from his own shoulders to those of County Surveyor by reason of the fact that a profile of the river bottom was furnished by the County Surveyor, such a profile would show only the proximate depth of the water and the contour of the river bottom at the bridge site and would not indicate the character of the gravel or bedrock, if any, nor take the place of actual soundings which would be necessary to determine how deep the excavation could be made and how far the piling could be driven under the specifications. Mr. Raynor and the members of the Bridge Co. visited the site of the bridge and presumably procured the necessary data to enable them to act with intelligence and in accordance with the contract.

The evidence is not all before the Court but only so much thereof as is necessary under the ten assignments of error contained in the Bill of Exceptions pages 128-131. And so far as Mr. Geary's opportunity to examine the piling at the time of his visit at the site of the bridge is concerned, we think the finding of the Trial Court is conclusive pp. 122-123.

We think also under the assignments of error and the record as made up the courts findings are conclusive as to the cause of the collapse and the Bridge

Company's responsibility therefore.

On pages 91-92 of the Record the plaintiff objected to the introduction of any testimony tending to show that there was any change or alteration of the contract in question. The question, objection, and ruling are as follows:

“Q. Mr. Klenck, now, have you any reference there in your papers and documents that you have with you, to the time when a payment was made upon the bridge. I call your attention to page 342 of the minutes of the Board of County Commissioners.

“By Mr. Logan,—I will tell you, Judge Rasch, we will admit that these payments were all made out of the order provided in the contract, if you care to save that time.

“By Judge Rasch,—Then it may be admitted, I imagine, that on the 26th day of November, 1912, an additional ten thousand dollars was authorized to be paid, and was paid to the bridge Company.

“By Mr. Logan,—Yes, we will admit that. Of course, the admission is subject to our objection to the whole testimony relating to payments. As I understood the Court, we can state the grounds of our objection at a later time. One of the grounds is that you have not set up the affirmative defense that entitles this to be admitted.

“By the Court,—You must state your objection, if you have any.

“By Mr. Logan,—The plaintiff objects to this

testimony in addition to the grounds already stated, that there has been no plea, no affirmative plea, setting up an alteration in the contract which would discharge the surety; that it was beyond the power of the County Commissioners to discharge the surety from an obligation required by statute for the construction of a bridge; and upon the further ground that it is an immaterial departure from the contract under the rules laid down by the Supreme Court of the State of Montana, and the Statutes of Montana.

“By the Court.—The objection will be overruled at this time. If the evidence is not competent, the Court will attach no weight to it.”

In the opinion rendered by the Court at page 121 is found the following:

“The answer is of denials only.”

At this time we earnestly urge that not having pleaded the so-called alterations or changes in the terms of the contract affirmatively, plaintiff in error is in no position to ask this Court to consider such changes or alterations, nor to claim that by reason of the same the surety was discharged.

ARGUMENT.

The first point urged by Plaintiff in Error is that the Complaint alleges the making of a contract on the 18th day of December, 1911, the changing and altering thereof during the month of February, and an Amendment at the trial to the effect that the contract was made on the 18th of December, 1911, and a modification thereof on the 5th day of February, 1912.

It is urged that the bond upon which suit is brought is dated the 20th of December, 1911; reference is made to the contract made on the 18th day of December, 1911, and counsel say:

“And it is obvious that a bond executed on the 20th day of December, 1911, would have no reference to a changed or new contract made on the 5th day of February following, moreover there is no allegation that the National Surety Company executed any bond to cover a new contract of February 5, 1912, which it is claimed the Coast Bridge Company breached.”

And further on they say:

“We take it that a reading of the Complaint will show no allegation of a respect in which plaintiff complains that the Coast Bridge Company breached the contract of December 18, 1911.”

This is the first time that our attention has been called to what appears, from the record, to be a

manifest clerical error, or, at most, inadvertence in preparing the Complaint. It is to be noted first that in respect to the breach assigned in the Complaint, there is no difference between the language of the specifications forming a part of the original contract and the specifications forming a part of the changed or altered contract.

The clause as contained in the later specifications, is found on page 24, being a part of the judgment roll and an Exhibit to the Complaint. The clause contained in the specifications forming a part of the original contract, is found on page twenty-four, and as before suggested, the language of the two clauses is identical. The breach assigned in the complaint is as applicable to one as to the other.

We submit that counsel's objection has come too late, and that he has waived the right to urge, at this time, that there is a variance, or failure of proof, in respect to the contracts. In the first place, under the ruling of the trial court (P. 120) the Complaint is deemed amended to conform to the proof. In the second place it is to be noted that no special Demurrer or Motion to make more definite or certain, was interposed. In the third place, it is to be noted that all of these contracts, bonds and specifications were introduced without objection. On page 85, Louis G. Klenck, County Clerk, testifies:

“I have with me and now produce the contract made in February, 1912, modifying the original contract.”

The Bill of Exceptions, then recites:

“Said contract with the specifications referred to therein, was produced, and it was thereupon stipulated that a true and correct copy of the same was attached to and made a part of the Complaint in this action.”

Thereupon the witness further testifies:

“I have with me and now produce the bond, executed by the defendant, the National Surety Company.”

The record then recites:

“It was stipulated that a true and correct copy of said bond was attached to and made a part of the Complaint in this action.”

See page 86.

The Answer admits the execution of the bond. See page 53, and on page 62, the original Agreement and the plans, specifications, were offered and introduced without objection. At no time was the attention of the trial court or plaintiff directed to the alleged discrepancy in the dates, between the bond and the contract, nor was any objection made in any manner to the correctness of the Exhibits as set forth in plaintiff's Complaint. The discrepancy in dates, therefore, is immaterial. The contract of February 5, 1912, (Plaintiff's exhibit “A”, pages 8-10) and the Bond (pages 26 to 29) constitute but one instrument and the surety is bound by the recital in the bond to this effect.

“* * * * *

For the erection, complete of a two span riveted bridge over the Kootenai River at Rexford, Montana, together with three concrete piers; also the lumber and railings for said spans, and all other material, all strictly in accordance with the amended and changed maps, plans and specifications thereof, and according to the term of the contract, aforesaid, *all of which are made a part hereof.*”

There are various discrepancies in the matter of dates. For instance, the bond seems to have been signed on the 20th of December, 1911 (See page 29), and it seems to have been approved by the Chairman of the Board of Commissioners September 9, 1912. The bond distinctly refers, in the body thereof, to the “changed and altered plans”, and it refers to the original contract of December 18th, 1911. No evidence was offered showing any other change in the plans, and it is to be assumed that when the sureties attached to and made a part thereof the contract and specifications referred to, the matter of dates was deemed immaterial. It is to be noted that nowhere in the record is it suggested that the particular specifications and contract, attached to the bond, are not in fact the same contract and specifications attached to it at the time of the execution of the bond, and if there is any ambiguity or uncertainty concerning the pleadings in this respect, the plaintiff in error, alone, is responsible for that condition.

It is clearly evident that the date "20th day of December" was inserted erroneously by the Clerk or attorney who wrote the bond. Apparently the bond was copied in part from the original bond given to insure the performance of the contract of December 18th, 1911, as that bond would probably have been dated on or about Dec. 20th, 1911. The original bond of course was surrendered to the Security Company at the time of the execution of the new bond and it therefore does not appear in the record.

Ten specifications of error are set forth in the bill of exceptions. The first three relate to the pleadings and really constitute but one specification. The record nowhere discloses the ground of objection to the complaint, and the objections throughout the record in this respect are general, and we think were properly disposed of by the trial court in the following language:

"Defendant's objection to any evidence, 'for the purpose of the record * * * simply as a formal matter', no defect being pointed out, was over-ruled as of a class disfavored in that it tends to defeat justice rather than to promote it, the Court stating that if the complaint was defective amendment would be allowed. *If necessary, amendment is deemed made to conform to proof.*" (p. 120). (Italics ours.)

When a cause has been tried, and evidence has been admitted without objection, which tends to prove a material fact which should have been

pleaded, but was not, the deficient pleading will be deemed to have been amended to conform to such proof.

Ellinghouse vs. Ajax Livestock Company,
..... Mont., 152 Pac. 381.

Lackman vs. Simpson, 46 Mont. 518, 129 Pac.
325.

Hirschfield vs. Akin, 3 Mont. 442.

Hogan vs. State of Montana, 11 Mont. 498,
28 Pac. 969.

Wilson vs. Harris, 21 Mont. 374, 54 Pac. 46.

Lynch vs. Beckett, 19 Mont. 548, 48 Pac.
1112.

Crowder vs. McDonald, 21 Mont. 367, 54 Pac.
43.

The fifth specification is to the effect that the Court erred in not holding that the surety was released from liability by reason of the defendant in error having made payments on the contract before such payments were due.

The fourth and sixth specifications are to the effect that the Court erred in holding that certain alleged changes and modifications in the contract did not have the effect of discharging the surety.

The seventh specification is to the effect that the Court erred in deciding that the plaintiff was entitled to recover notwithstanding the failure to al-

lege and prove that the plans and specifications had been approved by the War Department.

The eighth specification takes exception to the failure of the county to appoint an engineer or inspector to supervise and superintend the work of construction.

The ninth specification is to the effect that the Court erred in refusing to find in favor of the plaintiff in error for the reason that the contract had reference to a “‘two-span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.’ ”

The tenth specification is so general as to be no specification at all.

Two general questions present themselves for consideration: First, was the surety discharged by reason of the alleged changes in the terms of the contract? Second, did the clause in the contract to the effect that the contract should not go into effect until the plans and specifications should be approved by the Secretary of War amount to a condition precedent, and was it incumbent upon the defendant in error to allege and prove the performance of such condition before being entitled to recover.

DID THE CHANGES IN THE CONTRACT HAVE THE EFFECT OF DISCHARGING THE SURETY?

In the first place, we submit that every change in

the contract, if change there were, was expressly authorized by the terms of the bond. In this case, the surety company undertook and agreed that the bridge company should construct the bridge according to the terms of the contract, and the plans and specifications; and the bond was and is a part of the contract. One of the recitals in the bond is as follows: “* * * *all strictly in accordance with the amended and changed maps, plans, and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof*”. (See record, page 27). One of the clauses of the contract reads as follows: “Third: Should the county, at any time, order alterations, deviations, additions, or omissions, not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation.” This clause, we submit, is sufficiently broad to authorize any conceivable change in the terms of the contract, or in the plans or specifications.

But we contend that, independently of this provision, the surety company was not discharged by reason of any of the alleged changes in the terms of the contract, under the rules laid down by both State and Federal Courts in recent years with relation to the discharge and release of sureties, especially sureties for compensation. And we further contend that, in one or two instances where plaintiff in

error alleges a change in the terms of the contract there was in fact no change whatever. For instance, in specification number six, they say, "*The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge which constituted material departures from the plan for the construction of the bridge adopted by the contract between said plaintiff and the bridge company.*" (Page 129 and 130). There is no evidence in the record that any change such as is mentioned in specification six was ever made. One of the witnesses for the plaintiff in error, R. A. McClayn, who happened to be the superintendent in charge of the construction and an employee of the bridge company, testified that Mr. Garey, one of the County Commissioners, "wanted the location of bridge moved sixteen feet closer to the Rexford side than was done, and a center pier was placed sixteen feet nearer the Rexford side of the river than shown on the plans." (See page 105). And on page 108 the same witness testified that the floor of the bridge was lowered three feet below the elevation shown on the plans to coincide with the shore on the Rexford side. The change, according to the witness (same page), was made after a meeting on the ground at which Mr. Duthie, County Surveyor, Mr. Pratt and Mr. Garey, County Commissioners, and Mr. Whitlock, President of the Coast Bridge Company, were

present and talked the matter over. The witness (page 108) says, I received the letter from the Coast Bridge Company, directing me to make the alteration.' And (on page 109) the witness testified, "When Mr. Garey requested the change in the location of the center pier, I immediately communicated with the bridge company in Portland by telegram." (Witness produces telegram which was offered and received in evidence, and is as follows:

TELEGRAM OCTOBER 17 1912

McCLAYN TO COAST BRIDGE COMPANY.
'Libby Montana Oct 17-12 Coast Bridge Company Portland Oregon Garey contends that extension over banks should practically all be on Rexford side and wants location of piers moved sixteen feet. As they now stand Rexford pier is fifty-two feet from water opposite pier twenty-two feet and located where engineer told me to put them. Will see Pratt and go up with delay ten days to move location fourteen bents false work drove coffer dam.

Ready to dridge wire B. A. McClane.'"
(Page 109 and 110).

To this telegram, the witness McClane received the following answer, "October 18, 1912. To B. A. McClane, Libby, Montana: *Consider change of location more expensive than beneficial. If Board insists, get written instructions to proceed under force account.* COAST BRIDGE COMPANY" (Page 110). This is all of the testimony appearing in the record on behalf of the plaintiff in error concerning

this alleged change; but (on page 111, 112, and 113) Mr. Garey gives his version of the several conversations. It must be apparent to the Court that, in respect to the particulars of specification six, there was no change either in the contract or in the plans or specifications. Mr. Garey, under the law well established in Montana relating to the powers of Boards of County Commissioners, had no authority whatever to order or direct any change in the terms of the contract or in the plans or specifications. Neither did Mr. Pratt, individually or acting jointly with Mr. Garey, have such authority. Neither did the so-called County Engineer, acting individually or in conjunction with Mr. Pratt and Mr. Garey or either of them, have any such authority. The fact of the matter is that the Board of Commissioners, as such, in session at the County Seat, might have made a change in the contract or in the plans or specifications which would have been binding on the County, but the individual members of the Board had no such power, and any act of theirs looking toward a change in the terms of the contract would have been a mere nullity.

In case of Williams vs. Commissioners, 28th Montana, at page 365, Supreme Court says ~~to power~~:

“To bind the county by its contracts, it must act as an entity, and in the scope of its authority. Its members may not discharge its important governmental functions by casual sittings on dry good boxes, or by accidental meetings on the public streets; and its chairman, un-

less lawfully authorized by the board to do some act, or acts, has no more power than has any other member of the board. The statutes do not vest the power of the county in three commissioners acting individually, but in them as a single board; and the board can act only when legally convened. (Paola & Fall River Railway Co. vs. Commissioners, 16 Kan. 302; 7 Am. & Eng. Ency. Law (2d Ed.), 979). And its minutes should be kept in such a manner as to give true and correct information to all inquiring concerning county affairs”.

It is to be observed that the instructions to Mr. McClane by the telegram of October 18, 1912, were clearly and specifically to the effect that the changes were not desirable, so far as the bridge company was concerned, and that, if the “Board” insisted on the change to secure a written order and proceed on force account. Mr. McClane’s authority was limited by this telegram, and it required, first, that before he make any change, the order should come from the “Board”, and not from the individual County Commissioners. Second, That the order should be in writing, and Third, that if the changes were to be made he should proceed on force account, and not otherwise. There is nothing in the record to show that the board ordered the change. There is nothing in the record to show that any written order was made in connection with any such change, and there is nothing to show that any record was kept of the item of wages or other expenses in connection with the change under the direction of the Coast Bridge

Company to the effect that the work should be carried on under force account. So that, as the record stands, the change was made by Mr. McClane without authority, if any such change was made. In this respect, there was a breach of the bond, and a failure to construct the bridge according to plans and specifications. Of course, as the trial court observed, we have no right to, and are not claiming damages on account of this breach; but it is absurd to contend that an unauthorized departure from the terms of the plans and specifications works a discharge of the surety when that is the very contingency, to guard against which, the bond was given.

The ninth specification of error is as follows: "The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a 'two-span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.' "

It is to be observed that the plaintiff in error had on the stand a number of so-called expert witnesses. But no evidence was offered to show the difference, if any, between a two-span riveted bridge, and a two-span pin-connected bridge. And the Court is asked to say that this so-called change in the terms of the contract was a material change. We submit, in the first place, that there is no proof in the

record that a two-span pin-connected bridge was substituted for a two-span riveted bridge. And if such were the case, and the bridge company constructed a two-span pin-connected bridge while the contract required it to construct a two-span riveted bridge, then the circumstance simply amounts to proof of another breach of the bond, and a violation of the terms of the contract, and the plans and specifications for which the surety would be liable had we asserted or claimed any damage by reason of the substitution. If, as a matter of fact, there is a material difference between a two-span pin-connected bridge, and a two-span riveted bridge, and if as a matter of fact the substitution was made, there is absolutely nothing in the record showing that the county or board of County Commissioners or any person connected with or representing the county was in any manner, directly or indirectly, responsible for the substitution, and the substitution was in direct violation of the clause of the bond to the effect that the bridge company "shall faithfully and truly observe and comply with all the terms, conditions, and provisions of said contract, and the changed and altered plans and specifications mentioned and shall well and truly and faithfully do and perform all matters and things by them undertaken to be performed under said contract." But, as suggested before, the record shows no substitution. The contract, Plaintiff's Exhibit A, (Page 8, 9, and 10), the specifications (Pages 10 to 25, inclusive), and the bond (Pages 26 to 29, inclusive) con-

stitute the extent of the surety company's responsibility and the measure of its liability; and in the specifications (Page 11) we find the following:

“PLAN A.

“Sheet 1. Sheet 1 shows the profile of the Kootenai River near Rexford, Montana, at the proposed site of the bridge. The proposed crossing shown on this sheet suggests a 2-220 pin-connected spans for superstructure, resting on one stream pier and two shore piers, together with the necessary wooden approaches.” It is true that the bond (Page 26) says that the contract is “for the erection complete of a two-span riveted bridge at Rexford, Montana, together with three concrete piers.” Thus it will be seen that the bond describes a two-span riveted bridge with three concrete piers, while the specifications suggest a 2-220 foot pin-connected span resting on one stream pier and two shore piers. There is apparently no serious conflict between the specifications and the bond. “Riveted” spans probably refer to the manner of constructing the steel spans; and “pin-connected” may refer to the manner of connecting the two spans together. But, be that as it may, the specifications are just as much a part of the surety company's contract as the bond itself, and is made so by reference, and we do not imagine the Court will speculate seriously as to the difference between the two kinds of bridges; and as a matter of fact there is nothing in the record to show what kind of a bridge was actually constructed, whether

it conformed to the type mentioned in the bond or the type mentioned in the specifications.

We submit that the following propositions are uncontrovertible:—

1: That every ~~warranted or empowered permitted~~ change made in the terms of the contract was ~~on the face~~, authorized by the clause in the contract authorizing such change, and that by reason of such clause the Surety Company authorized, empowered and constituted the Bridge Company its Agent, for the purpose of making such changes as might be agreed upon between the County and the Bridge Company.

2: That by virtue of the fact that the laws of the State compel the Board of County Commissioners when making a contract for the construction of a bridge, to require from the Contractor a bond conditioned for the faithful performance of the contract, and no contract made without such a bond is valid or operative, and when once given the bond cannot be released or discharged or the sureties exonerated by any act of the Commissioners which would defeat the purpose of the bond in the first instance.

See Sec. 1413 Revised Codes of Montana, ~~which reads as follows:~~ *Section 1413.*

3: That every change made in the terms of the contract, except those made by express written agreement to which the surety was a party, are immaterial changes and do not result to the damage of the surety or in any manner affect or lessen its

security.

Specification 5 takes exception to the fact that payments were made on the contract before same were due. Resolution, Page 89, recites among other things, that one, Robert Reid, had commenced a suit in equity to enjoin the commissioners from selling it's bonds; that the construction of the bridge was delayed and by reason of such litigation the Bridge Company was embarrassed, owing to the fact that it had fabricated considerable material, especially for the use of the particular bridge in question, and that if payment was postponed until the time fixed in the original contract, the Bridge Company would suffer considerably, accordingly the Board of County Commissioners changed the time of payment, and even went to the extent of making a partial payment in advance of the actual commencement of work on the ground.

The obvious effect of such payment was to relieve the Bridge Company from financial embarrassment, therefore tended to lessen the possible liability of the Surety Company, rather than to increase it.

If we are permitted to indulge in speculation, we might say,—if this payment had not been made, the Bridge Company would not have been able to carry out it's contract, and the resultant breach of the conditions of the bond would have imposed on the Surety Company the responsibility of proceeding with the construction of the bridge or paying the resulting damages, so that the act of the commissioners, as before suggested, was one which tem-

porarily, at least, avoided a loss on the part of the Surety Company.

Referring to page 113 of the record, Mr. W. K. Armstrong identifies a letter written by the firm of Logan & Child to the National Surety Company, and on page 116, the witness Armstrong identifies a letter from one Joseph Magee to Logan & Child. On the same page the witness Armstrong testified that Magee was General Assistant Solicitor of the National Surety Company, and identifies his signature to exhibit 14. At the bottom of page 117, plaintiff made an offer of proof which was objected to solely on the ground that it was “immaterial and irrelevant under the issues in the case”. In the letter of Assistant Solicitor General, Magee, referred to, this language used, “This company was merely surety on the bond in question and, of course, must be governed by the instructions and directions of its *indemnitors* (Italics ours), in all matters arising under it. We are definitely advised that the work was performed in strict accordance with the contract and specifications, and that it was done under the supervision of the County and its representatives, and that it was finally accepted as a fully completed contract by the County.” This testimony is material and relevant when we come to consider the contention of defendant, that it was discharged from liability by reason of the provision of the Montana Code. If the National Surety Company was *indemnified*, then the provisions of Section 5673 are not available as a defense, and that Sec-

tion, under such circumstances adds nothing to the provisions of Section 5686 relating to sureties; and having taken the position that the question of indemnity was irrelevant and immaterial under the issues in the case, and having objected to the introduction of evidence on those two grounds and those alone, they would not now be permitted to contend that the evidence did not sufficiently show that they were in fact indemnified, nor at this stage of the case to switch their theory as indicated at the time the evidence was taken. We, submit, of course, that the letter from Mr. Magee clearly establishes the fact that the defendant, Surety Company was, and is indemnified, and that as a matter of fact, the Coast Bridge Company is the real party in interest, and that the Surety Company is merely a nominal party, carrying out the wishes and purposes of the real party in interest, and this is the actual and legal effect of the giving of indemnity under the Revised Codes of Montana.

Section 5648, Revised Codes, Montana, provides:

“Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.”

Section 5654, Revised Codes, Montana, provides:

“In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears”:

“L. Upon an indemnity against liability,

expressedly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.”

* * * * *

“3. An indemnity against claims, or demands, or liability, expressly or in other equivalent terms, embraces the costs of defence against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion.”

“4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defences, if he chooses to do so.”

* * * * *

“6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.”

Section 5655 of the Revised Codes, provides:

“Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.”

Turning now to the subject of Exoneration of Guarantors, we find this in Section 5678, Revised Codes:

“A guarantor who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that creditor, without the assent of the guarantor, may have modified the contract or released the principal”.

And Section 5679, provides:

“A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor”.

In interpreting these provisions, the courts have held that:

“An indemnified guarantor or surety occupies the position of a principal.”

Moore vs. Paine, 12 Wend 123;

Ten Eyck vs. Holmes, 3 Sand. Ch. 428;

Smith vs. Steele, 25 Vt. 427, 60 Am. Dec. 276;

Ehrman vs. Rosenthal, 117 Cal. 491.

The reason for these provisions is found in the fact that a surety and a guarantor as a rule stand upon a different footing. The term guarantor is applied particularly to mercantile transactions and the contract of the guarantor, is separate from and independent of the contract of the principal, and a guarantor is not indemnified by operation of law.

and the guaranty is based usually upon a consideration passing to the guarantor. While on the other hand the surety's contract is a part and parcel of the contract of the principal, and he is always indemnified. In that the law gives him a complete remedy against the principal in the event he is compelled to satisfy the principal obligations; see Section 5690, Revised Codes. As before suggested, this is not true as to a guarantor, but when a guarantor is in fact indemnified, then his position is exactly the same as that of a surety, and he cannot claim discharge except under the terms of the statute relating to sureties.

They cannot claim that we have not shown the extent of the indemnity. The presumption is that they were indemnified to the full penalty of the bond. They objected to our showing the character and extent of the indemnity, and they were afforded a full opportunity to go into that question; and if there is any uncertainty, at all, as to the extent of nature of the indemnity that uncertainty was created by the act of the defendant, and they ought not to be permitted to take advantage of it.

Section 5673, Revised Codes, provides:

“A guarantor is exonerated, *except so far as he may be indemnified by the principal*, if by any act of the creditor, without the consent of the guarantor, the *original obligation of the principal* is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired

or suspended.

Notwithstanding—there may be some early decisions to the contrary, we submit that a fair, practical, rational and logical interpretation of this Section requires:

1. That the surety of guarantor must be without indemnity and must be without recourse on the principal before he can claim a discharge on account of any change in the contract.

2. That the change or alteration, if any, must be *by the act of the creditor*, and without the consent of the guarantor.

3. The alteration must be of the original *obligation of the principal*, or

4. The act of the creditor must be such as to impair or suspend the remedies or rights of the creditor against the principal.

None of these conditions appear in this case. As we have said, the guarantor is indemnified. If the Coast Bridge Company proceeded to construct the bridge without the consent of the Secretary of War, that was not the act of the creditor, and if it were the joint act of the Coast Bridge Company and Lincoln County, still it would not amount to an alteration of the "*Original obligation of the principal.*" The question relating to the securing of permission of the Secretary did not touch the obligations of either party, but simply fixed the time, at most, when the contract should take effect. The obligation of the Coast Bridge Company was to construct a bridge according to the plans and specifica-

tions, and in no event can it be urged that the obtaining of such a consent, or failure to obtain it, altered the obligation of the principal. Nor can it be urged that by reason of the waiver or alteration of the original contract, the remedies or rights of the creditor against the principal were in any wise impaired or suspended. And what we had to say with reference to the change concerning the approval of the Secretary of War, if change it were, applies with equal force to the matter of the so-called premature payments. It can hardly be said that the *original obligation* of the principal was to accept payments, and the law says nothing about a change in the original obligation of the creditor, nor did the payments in this case impair or suspend any remedy which the creditor may have had against the principal. There is nothing in the Section just quoted which prevents the County from lawfully paying the contract price before the completion of the work, or precluded the parties from waiving the condition as to the approval of the Secretary of War. Nor in any event, can it be gathered from the record that the surety was prejudiced by any of these changes:

“Prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which would lessen his surety.”

So far as the payment was concerned, it was to be made in any event when the work was completed and defects in the construction of the bridge were not

discoverable at that time, so that the surety was not prejudiced in that respect by any act of the creditor, nor can it be claimed that the surety was prejudiced by the waiver or alteration of the original agreement as to the approval of the Secretary of War. Since that change “did not naturally prove injurious to the remedies of the surety or inconsistent with his rights” nor did it lessen his security.

“In order for a surety company to be relieved of liability, it must appear that the breach of the assured contract, which it claims discharges its liability, is a substantial one, working pecuniary disadvantage to the surety or depriving it of some protection or privilege reserved in the bond.”

Leiter v. Dwyer Plumbing & Heating Company, 133P. 1180 (Or.)

“A surety on the bond of a contractor to erect a building under a contract permitting the owner to request alterations is not released from liability because of alterations”.

Wolf v. Aetna Indemnity Co. of Hartford, Conn., 126 P. 470, 163 Cal. 597.

“A provision in a building contractor’s bond that all payments should be made, on written certificates of the architects, being for the owner’s benefit could be waived by him without affecting the surety’s Liability on the bond.”

Southwestern Surety Ins. Co. v. Minnetonka Lumber Co., 148 P. 1038 (Okla).

“A stipulation in a building contract permitting alterations, held binding on the contractor and surety who was not discharged by alterations in the absence of evidence increasing his liability.”

Dunne Inv. Co. v. Empire State Surety Co.,
150 P. 405, rehearing denied 150 P. 411
(Cal).

The case of the Dunne Investment Company vs. Empire State Surety Company, 150 Pac. 405, is a modern case decided by the District Court of Appeals, April 21, 1915, and re-hearing was denied by the Supreme Court, 1915. In that case the court says after calling attention to the old rule that the surety may stand upon the strict letter of his bond, and that any change in the contract discharges him:

“The language of our Code section, above referred to, clearly declares that the creditor or obligee must do some act with reference to the contract to insure the faithful performance of which the security binds himself—that is, depart from its terms in some material respect—which will prejudice the rights of the surety as such. This appears to be the sounder principal, and is based upon the idea that, while there should not be added to the liability of the surety burdens which he has not by his undertaking assumed or become responsible for, yet if any variations made in the contract by the obligee under the bond, without the consent of the surety, have not had the effect of so prejudicing the surety as to injure or impair his remedies in

any degree or of lessening his security in any measure or are not in any sense inconsistent with his rights under his bond, then there does not exist under his bond, any just ground for the claim by the surety of a discharge from the obligations of his bond. By the principals thus stated, the building contract, which constitutes the measure of the surety company's liability, must be constructed, and thus the specific points made in impeachment of the judgment and the order appealed from tested”.

In that case it is to be noted that it was an iron clad bond, particularly as concerning payments, and was evidently drawn with a view to protecting the surety against premature or unauthorized payments, in view of the fact that the class of work contracted for was such that liens might be filed against the structure and the sureties be held liable therefor—a condition which does not exist in the case at bar—yet in the case cited, the court says:

“In the first place, even if it may be said that the payment was made under or within the provisions of the contract but in violation of the terms thereof for the reason that the materials were not in the building when paid for and the payment made in the absence of a certificate of the architect, the answer is that the proof shows that said materials were actually used in the building and they and the payment for their freightage accounted for in a subsequent estimate and payment. Hence the surety company cannot put forth a substantial claim that it was injured or its rights impaired, and therefore

cannot complain. *Bateman Bros. v. Mapel*, 145 Cal. 241, 243, 78 Pac. 734. If, on the other hand, the payment was not within the terms of the contract—if in other words, it was a payment not authorized or prescribed by the contract—*then plainly it constituted merely an advancement of money made by the plaintiff upon its own personal responsibility and ‘entirely without the terms of the contract’ in which case the ‘surety has no grievance, unless in substantial way its condition has been changed or a new liability is sought to be imposed upon because of such payment.’ Id.* And, as is manifest the effect of the advancement was not to change the condition of the appellant as a surety or to impose upon it a new or additional liability. Indeed the truth is that, *since the materials were assential to the construction of the building, it was to the benefit of the surety company that they be procured and placed in the building at the earliest practicable moment and thus, to that extent, prevent such delay in the completion of the structure as might result in requiring said company to respond in the damages fixed by the contract for default in completing the building within the specified time.’*

On rehearing 150 Pac. Page 411, the supreme Court of California took note of the provision of the California Code to the provision of our code, to the effect that the surety is exonerated in like manner with the guarantor, and says:

“Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or

suspended it is thoroughly settled by our decisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby, and the cases relied upon by the petitioner here in this connection involve such a situation, as, for instance, the effective granting by the creditor to the debtor of an extension of time within which to pay a note, or a material change in the terms of a contract. But the opinion of the District Court of Appeal sufficiently shows that the facts of this case are not such as to bring it within the provisions of Section 2819 of the Civil Code. The original obligation of the principal was in no way attempted to be altered, and there was no act of the owner which in any way impaired or suspended the owner's right as against the principal. And the only provision of our Civil Code to be considered here is subdivision 2 of that section 2840, as the opinion assumes.

As applied only to such a case, there is nothing in the opinion which in our judgment is erroneous."

See also *Dodd v. Vocovich*, 38 Mont. 188.

In substance the Supreme Court of California held, that the court of appeals was justified in that particular case in eliminating practically from consideration the provision relating to exoneration of the ^{guarantor} grantor, and of basing its decision upon the section relating to the exoneration of sureties, and the rule is there clearly established that the change must be in the original *obligation of the principal*.

In the case Baglin vs. Title Guaranty and Surety Co., 166 Fed. Rep. 356, the court says:

“And the court of Appeals for the Fourth Circuit in Atlantic Trust Co. v. Laurinburg, 163 Fed. 695, used the following language:

“Fully recognizing the rule of *strictissimi juris* as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts underwritten by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to secure, for a ~~momentary~~ ^{momentary} consideration the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, operated injuriously to affect its own rights and liabilities * * The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of the individual suretyship that give application for this rules by them taken away; that it is their business to take risks and expect losses. *If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before*

they can ask to be relieved from contracts which they clamor to execute."

In the case of Williams vs. Pacific Surety Company, decided June 15, 1915, 149 Pac. Rep. Page 526, the Supreme Court of Oregon:

"The great weight of authority supports the doctrine announced by this court in the case of Bross v. McNicholas supra. But, in this day and age of corporate sureties, when the burden is lightened by, the payment of adequate premiums and, their final liabilities oft times secured, by counter indemnity, the strictness of the old rule is relaxed, and the modern day, surety company must show some injury done, before they can be absolved from the contract which they clamor to execute', Baglin v. Title Guarantey Co. (C. C.) 166 Fed. 356; Leiter v. Dyer Plumbing Co., 66 Or. 474, at page 482, 133, Pac. 1180.

"In the letter this court, speaking by Mr. Justice Bean, says: 'In order for the surety Co. to escape responsibility, it should appear that such company has been prejudiced by a breach of contract. The breach must not have been merely technical, that a substantial one, working a pecuniary disadvantage to the surety Co. or depriving it of some protection or privilege reserved in the bond.' It is needless to multiply citations. The instructions complained of are a correct expositions of the law."

DID THE CHANCE IN THE PLANS OR IN THE MATTER OF THE PAYMENT DISCHARGE OR RELEASE THE SURETY?

Under the rule laid down in the case of *Dodd v. Vocovich*, 38 Mont. 188, *supra*, no change in the terms of the contract will release the surety unless such change result to the detriment of the surety, and the only change in this contract which could have resulted to the detriment of the surety, so far as the time of payment of the contract price is concerned, would be with reference to that condition of the bond, which guarantees that the contractor will pay for all material, and labor, and of course, if the payment had been prematurely made, and the contractor had failed to pay for his material or labor, and liens were filed against the Bridge as a result; or individuals for whose benefit that clause was inserted in the contract, had commenced suits against the surety company to recover for wages or material, then it might be contended that the change as to payments resulted to the damage or detriment of the sureties, but not otherwise, because there is nothing in the bond or contract which in any way limits the county in making the payment.

IN SPECIFICATION 8 DEFENDANT COMPLAINS OF THE FAILURE OF THE COUNTY TO APPOINT AN ENGINEER TO SUPERVISE THE CONSTRUCTION OF THE BRIDGE.

Sections 1413 *supra* of the Revised Codes of Montana specifically and clearly prescribe the manner in which a Board of County Commissioners must discharge its duty when contracting for the construction of public bridges, and that Section 1414 relieves

the board of any duty of supervision, and substitutes for such supervision the requirement that the contractor shall furnish a bond conditioned for the faithful performance of his contract, and that the only duty imposed upon the Board of Commissioners is to select a set of plans and specifications suitable for the purpose, and to see that a valid and responsible bond is furnished. From the moment those conditions are complied with, both the contractor and the surety becomes insurers, and are charged with the duty of seeing that every material provision of the contract is carried out, and that the work is done according to such plans and specifications, and the whole duty of supervision rests upon them. And from these statutory provisions, the conclusion is inevitable that the Board of Commissioners, neither as a Board duly in session, or as individuals, have no power or authority to fritter away the benefits of the legislative enactments by any act or series of acts which would result in discharging the bond, or releasing the sureties, to the detriment of the public. It is presumed that the sureties and the contractor entered into their contract in view of the law in existence, and that such law became a part of the contract itself.

Section 1413, Revised Codes of Montana:

“Contract for construction.—No bridge, the cost of construction or repairs, of which exceeds Two hundred dollars, must be constructed or repaired except on the order of the Board of County Commissioners; and when ordered to

be constructed to be constructed, or repaired it shall be done by contract. Before any contract shall be let as provided herein the Board of County Commissioners shall advertise for bids therefor at least once a week for two successive weeks in a newspaper of general circulation in the county, and a contract shall then be awarded to the lowest responsible bidder, who shall, before entering on the performance of the work, execute and deliver to the said Board an undertaking with two or more sureties, to be approved by the Board of County Commissioners, in a sum not less than twice the amount for which the contract is awarded. (Act approved March 2, 1903. Paragraph 77). (8th Sess. chap. 44.)

1413 Rev. Code Mont.

Sec. 1414:

“Contract awarded to lowest responsible bidder.—All bids must be sealed, opened at the time specified in the notices, and a contract awarded to the lowest responsible bidder. The Board of County Commissioners may, however, reject any and all bids. The contract and bond for its performance must be entered into and approved by the said Board, except in cases of great emergency, and by the unanimous consent of all its members, the said Board may proceed at once to construct, replace and repair any and all structures of whatever nature without notice. (Act approved March 2, 1903. Paragraph 78). (8th Sess. Chap. 44.)

1414 Rev. Code Mont.

It is admitted that the defendant in this case is a Surety Company, organized for the purpose of furnishing bonds, and is compensated; and it is to be presumed also, that it has taken the proper steps to indemnify itself against any default on the part of the principal, and therefore, the rules of law applicable to it are the same rules that would apply in case the contractor alone were the defendant in the action. Such is the trend of all modern decision, and this contention is particularly sustained by the decisions which are regarded as high authority in the State of Montana. In the case of *Callan v. Empire State Surety Co.*,Pac., 978, 20 Cal. App., 483, the Supreme Court of California held that a bond to secure the performance of a building contract, attached thereto, which provided that it should be void if the contractors faithfully complies with the conditions of the contract, made the surety company a party to the contract. And that a surety bond might by reference incorporate other contracts or written instruments, or be condition for the performance of agreements contained in such instruments, in which case the bonds and contracts should be construed together. In Colorado, the Supreme Court held that a contract of surety-ship of a corporation organized to make bonds for profit, must be construed most strongly in favor of the obligee.

Empire State Surety Co. v. Lindenmeier, 131
Pac. 437, 54 Colorado, 497.

In Kansas, the Supreme Court held that the law

does not have the same solicitude for incorporated surety companies, as it has for voluntary sureties, and such corporation being essentially insurers, the rule peculiar to suretyship did not apply.

Chicago Lumber Co. v. Douglas, 131 Pac. 563, 89 Kan. 308, 44 L. R. A. (N. S.) 843.

In the state of Washington, the rule of strict construction in favor of sureties has been repudiated in so far as the liability of paid sureties is concerned.

N. P. Ry. Co. v. Fidelity Deposit Co. of My., 134 Pac. 498, 74 Wash. 543;

G. N. Ry. Co. v. Fidelity Deposit Co. of Maryland 134 Pac. 500, 74 Wash. 698.

In Wyoming the same rule is established in the case of United States Fidelity and Guaranty Co. v. Parker, 121 Pac. 531.

The court of appeals of the District of Columbia, in the case of U. S. Use of District of Columbia v. Bayly and Fidelity Company, 39 App. Cas., Dist. of Columbia, 105, adopts the same rule.

“The doctrine that a surety company is a favorite of the law, and that a claim against it is *strictissimi juris*, does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves ‘sureties’ their business is in all essential particulars that of insurers.”

32 Cyc. 306, 307, 98 A. S. Rep. 838 and note.

The brief of plaintiff in error contains the following remarkable statement:

“The evidence shows a further material change. In the original plan, and in the modified plans and ~~in the modified plans~~, referred to in the bond under ~~date of December 20, 1‘11, the bridge was to con-~~ date of December 20, 1911, the bridge was to ^{be} constructed under the direction of the County was a two-span link connected bridge. The riveted steel span bridge would have been firmer in place and would have tended to sustain the pier in its proper position, whereas the link connected span would buckle under any end pressure and would not resist the weight of the pier.”

There is no evidence whatever that the bridge was constructed under the direction of the county; nor is there any evidence in the record to enlighten us concerning the technical question whether “a riveted steel” bridge would have been firmer in place or would have tended to sustain the pier in its proper position; nor whether a “link connected span” would buckle under end pressure or would not resist the weight of the pier. Although a number of expert witnesses were called by the plaintiff in error no evidence along this line was offered or introduced and unfortunately geographical conditions prevent us from cross examining counsel concerning his knowledge of this technical subject, or

to inquire into the difference if any between the “*pin* connected span” mentioned in the specifications attached to the contract and in the assignment of errors and the “*link* connected span” referred to in the brief.

On page 44 to page 50 of their brief counsel undertake to shift the responsibility for the construction of the bridge from the Bridge Co. to the County. The court below found that the Bridge Co. was negligent in the manner set forth in the complaint and we find nothing in defendants assignment of errors which justifies them in urging this point at this time and we submit that this court is without jurisdiction to consider this phase of the case. However we will briefly reply to the counsel’s contention as we think it is wholly without merit regardless of the question whether the alleged error of the trial court is properly before this court for review.

The execution of the bond in question is admitted by the answer, and the proof as to the execution and delivery of the contract involved, offered by the plaintiff, has not been controverted by the defendant. We submit that the proof is conclusive that the bridge in question collapsed, and that it collapsed in consequence of the failure of the defendant, Coast Bridge Company, to drive the piles in the center pier in accordance with the specifications; but we are met with the extraordinary contention on the part of the defendant (if we understand the purport and significance of its case), that we are in

error in our theory as to the cause of the destruction of the bridge, but that such destruction was caused by the failure of the bridge company to sink the center concrete pier to such a point that it would be able to carry the structure with safety. In other words, if we understand the defendant's position, it argues that while the negligent act set forth in the complaint, was not the cause of the injury, another negligent act on the part of the defendant was in fact the cause. If we assume for the moment that the National Surety Company was, and is a party to the contract, and therefore, bound by all its terms, not necessarily as a surety in the ordinary sense of that term, but as an insurer, or a principal; and we further assume, as the evidence clearly shows that the specifications were left open so that the party constructing the bridge could use its judgment and discretion in the matter of sinking the piers to a solid foundation, then in the event the court should find as a fact that the collapse of the bridge was not due to the particular act of negligence or omission specified in the complaint, but was due to the failure of the Bridge Company to sink the concrete pier to solid foundation, then it would clearly be the duty of the court to approve the ruling of the trial court treating the complaint as amended, *to conform to the proof*, for the concrete pier and the piles were so closely allied as to constitute in effect one thing. We do not think it can successfully be contended that a defendant may escape liability by admitting to all intents and pur-

poses that the injury was caused by his negligence, but not by the particular act of negligence set forth in the complaint. Of course the Montana Code of Civil Procedure (Sec. 6585 R. C.) provides that no variance shall be deemed material unless the adverse party has been misled to his prejudice, and the decisions of our Supreme Court are all to the effect that no variance is fatal unless it amounts to a failure of proof; and the Supreme Court of Montana has further decided that a defective allegation, or a want of an allegation in a complaint is cured if the answer supplies such allegation.

“Where an omission in a complaint is covered by an allegation of the answer, the defect is cured.” *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46.

“An answer which assumes that the complaint contains an allegation, supplies the omission.”

Lynch v. Bechtel, 19 Mont. 548, 48 Pac. 1112;
See also *Crowder v. McDonald*, 21 Mont. 367,
54 Pac. 43;

Hamilton vs. Great Falls St. Ry. Co., 17
Mont. 334, 42 Pac. 860.

By analogy, it is not unreasonable to say that if plaintiff's case does not establish the contract breach, but that defendant's proof does, it would be in furtherance of justice to direct an amendment of the plaintiff's complaint to conform to such

proof; and that such amendment shall consist in adding to the complaint an allegation of the additional and independent act of negligence, in view of the ruling by our Supreme Court that where two or more acts of negligence are alleged, not concurrent or interdependent, proof of any one of the acts is sufficient to sustain a verdict. Nor could it be successfully contended for one moment, that the defendant was misled when it comes into court and says: "The destruction of your bridge was not caused in the way you say it was, and we know just how it was caused, and we will now proceed to tell you."

Where there is a defect in a pleading which would be fatal on demurrer, yet if the issue be such as necessarily requires proof of the facts so defectively alleged, or omitted, and without which the verdict would have been given, then the omission or defect is cured by the verdict.

Hershfield v. Aiken, 3 Mont. 442;

See also 1 Am. Dec., 210.

Defects in pleadings are waived where the testimony relating thereto is received without objection.

Hogan v. Stuart, 11 Mont. 498, 28 Pac. 969.

When a cause has been tried, and evidence has been admitted without objection which tends to prove a material fact which should have been pleaded, but was not, the deficient pleading will be

deemed to have been amended to conform to such proof.

Ellinghouse v. Ajax Livestock Co. (Mont.)
152 Pac. 381;

Concurring Opinion of Justice Holloway on
page 486;

Moss v. Goodhart, 47 Mont. 257, 131 Pac.
1071;

Lackman v. Simpson, 46 Mont. 518, 129 Pac.
325.

If these principles here announced, which were the law of this state at the time, apply, then the pleadings in this case will as a matter of law, be considered amended so as to enable the plaintiff to recover damages for the defective construction of the concrete pier, in the same manner as if that defective construction had been specifically named in the complaint filed.

That the Bridge Company undertook the entire responsibility of constructing the bridge in such a manner as to make it safe and secure, we think there can be no question, since the county had no engineer upon the ground, and did not in any manner seek to interfere with, or control the judgment of the Bridge Company. Mr. Raynor, the Bridge Company's engineer, testified (p. 103), that the plans of the bridge showed several feet more of concrete pier than was actually put in, and that the plans simply

designated a particular depth of concrete as a general basis, and that it was not intended that the excavation should be sunk to such a point as to enable the Bridge Company to use a pier of the exact height of that shown on the plans, but that the pier might be shortened or lengthened to meet the actual physical conditions of the river bottom when the work of construction should be commenced, and to that end the plans in that respect were left open, and provision made for the payment for additional concrete, or for deduction from the contract price accordingly as the pier might be lengthened or shortened; and all of their witnesses, who pretended to be qualified as experts, including Mr. Raynor himself, testified that it would have been proper engineering to have excavated three or four feet of apparently loose gravel, and placed the bottom of the concrete pier at that point, and if it would have been good engineering to have done this, then we are justified in assuming so far as the contention of the defendant is concerned, that a safe and permanent structure would have resulted, and that the bridge would now be standing and servicable for the use of the public. Of course, as before suggested, we contended most earnestly that the proof shows that the collapse of the bridge was the result of the failure on the part of the Bridge Company to drive the piles to refusal, and we have indulged in the foregoing argument only for the purpose of getting before the court our contention that in no event can the Surety Company escape liability.

DID THE ACCEPTANCE OF THE BRIDGE,
OR THE PAYMENT THEREFOR, RELEASE
THE SURETY?

As before suggested, of course, there could be no acceptance under the laws of Montana that would discharge the surety of the contractor, in the event the contractor did not build the bridge according to specifications. To hold that a mere acceptance or payment for the bridge would have such effect, would be to place in the hands of the county commissioners the power to defeat the very purposes for which the bond was given, and the Board of Commissioners being a board of limited authority, no estoppel could grow out of dealings with it as against the public. In the matter of the construction of bridges, it must be borne in mind, the county is not dealing as a municipal corporation in its proprietary capacity. In other words, it is not dealing with its own property in the ordinary meaning of the term, but is acting as a trustee, not for the taxpayers of the county, but for the public generally, which includes the people of the entire state. In other words, it is a governmental arm of the state (*State v. Amandson*, 23 N. Dak. 238, 135 N. W. 1117), and the same rules that apply with reference to the acts of state officials or officials of the federal government apply to county commissioners, when they are dealing with subjects concerning the public highways.

In the case of *St. Louis Board of Education v. National Surety Co.*, 183 M. 166, 82 S. W., 70, the

court held that the payment for a heating plant installed by a contractor for a school district did not release the surety company, and although defects in the plant were not discovered until the following winter, suit upon the bond might be maintained, and the same principle was laid down in the case of

Newark v. N. J. Asphalt Co., 68 N. J. L. 458,
53 Atlantic, 294;

and in the case of State ex rel Workmen v. Goldwait, 172 Ind., 210, 19 American & English Ann. Cas. 737, the court held:

“No estoppel can grow out of dealings with public officers of limited authority.”

Mr. Brant in his work on suretyship and guaranty, citing numerous authorities, laid down this general rule:

“Alterations to discharge the surety must be made by the parties to the principle contract. Where they are made by the architect without the owner’s consent, the surety is not released.”

And in the case of McCoy v. Able, 30 N. E. 530; re-hearing, 31 N. E. 453, the Supreme Court of Indiana says:

“The first question presented by specification of error, found upon the ruling denying a new trial, is to the effect of the estimates of the engineer and the acceptance of the Board of Commissioners. We cannot agree with counsel that the engineer’s estimate is conclusive,

for we understand it to be settled by our decisions that parties cannot, by agreement in advance, oust the jurisdiction of the courts, and make conclusive the estimate of an engineer or other person.”

In the case of *Hart v. U. S.*, 95 U. S. 316, the rule is laid down as follows:

“The government is not responsible for the laches or the wrongful acts of its officers (cases cited). Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of the principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect.”

To the same effect see

United States v. Boyd, 15 Peters, 208;

Jones v. U. S., 18 Wall. 662;

Bobban v. U. S., 8 Wall. 269;

Hart v. U. S., 95 U. S. 218;

Minturn v. U. S., 106 U. S. 444;

See also *B. Co. Com. v. O'Connor*, 35 N. E. 1006 (Ind.), Rehearing 37 N. E. 16;

Am. Surety Co. v. Scott & Co., (Okla), 90
Pac., 7.

In the case of Guaranty Company v. Press Brick Co., *supra*, the Supreme Court of the United States held that the rule of strict construction should be relaxed in the case of a surety company for compensation, and such bond should be construed liberally in favor of the obligee. We think that so far as this phase of the case is concerned, that it is absolutely set at rest by the case of *U. S. v. Walsh*, 52 C. C. A. 419. The decision was by the Circuit Court of Appeals, 2nd circuit, and we will quote the syllabi in full.

“1. Contract for Constrution of Government Work—Construction—Waiver of Breach by Officers.

“A contract for the construction of a dry dock for the United States required such construction to conform in all respects to the plans and specifications which were attached and made a part of the contract, and provided that such plans and specifications should not be changed in any respect except upon a written order of the bureau of yards and docks, and by written agreement between the parties. It further provided that the government should have a competent civil engineer in charge of the work, who should have the privilege of inspecting at all times the materials and work, with power to reject either materials or work deemed by him unsuitable or not in conformity with the contract or plans and specifications. Held,

that such engineer could not bind the United States by consenting to deviation from specific requirements of the specifications as to workmanship or materials, which fact the contractors were bound to know, and that no action or neglect of his or his subordinates could operate as a waiver or estoppel on the part of the government to relieve the contractors from liability for such departures from the requirements of the contract.

“2. Same—Effect of Acceptance—Ignorance of Defects.

“The contract further provided that the contractors should not be entitled to full and final payment until the dock had been tested by officers designated by the government, and accepted after their approval. Held, that an acceptance and payment of the contractors after such test did not conclude the government if made in ignorance of facts which, if known, would have led to a refusal to accept, and that, where the final test was made under conditions which did not permit structural departures from the specifications to be discovered by the officers making it, the government was not chargeable with notice of such defects, to preclude it from holding the contractors liable therefore on their subsequent discovery, because of the knowledge of or consent to the same by its engineers in charge of the work, who, as the contractors were bound to know, had no authority in the promises.

“3. Same. The acceptance by the engineer, or his acquaintance as the work proceeded, and

the final acceptance of the dock by the board of officers designated by the navy department, are important evidential facts tending to prove that the work and materials complied with the contract; but they are not of controlling effect, and neither such acceptance nor the payment of the contract price necessarily deprives the government of its right of action for a breach of the contract in material and substantial particulars.

“4. Same. Discharge of Surety—Modification of Plans. A surety for the performance by the contractor of a building contract, which provides that changes may be made in the plans and specifications by written agreement of the parties; is not discharged from liability by modifications so agreed upon which are not so extensive as to radically change the contract and subsequent a different one.”

The defect in the instant case was latent as stated in the complaint. It will be observed that in this case a number of other questions pertinent here have been decided favorably to our contentions.

In any event it is our contention that matters in discharge or release of a surety are matters of defense and the defendant is not entitled to prove such matters unless pleaded. The force of this contention will be readily seen when we refer to the one proposition of obtaining the consent of the Federal Government for the construction of the bridge; in support of this contention, we cite the Third Southerland Code pleading, paragraph 4970;

U. S. v. Bradley, 10 Peters, 343, 9 L. Ed. 448;

Mayor of Alexandria v. Moore, 1 Cranch C. C.
440.

FEDERAL CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR—NOT IN POINT.

On pages 26 to 33 inclusive, of their Brief, counsel quote at length from the decisions of the United States v. Freel, 186 U. S. 309; 46 L. ed. 1177, and American Bonding Company vs. U. S., 167 Fed. 910, and lay great stress upon the importance of these cases as authority here. We submit that the cases are not in point. In the first place, as hereinbefore suggested, whatever changes were made in the bridge were made by the Bridge Company, and the contract was not altered or modified except in the particulars set forth in the complaint. Counsel has failed to distinguish between a change or alteration of the terms of the contract, a voluntary departure from the plans and specifications by the construction company. It is not to be lost sight of at any stage in this case, that the bond was given to insure the faithful performance of the contract by the construction company, and it is new doctrine to say that a violation of the terms of the contract by the construction company, releases the surety. But, be that as it may, and assuming for the purpose of argument that changes were made during the course of construction, and that the changes were made at the instigation of the county, and that the acts of the

county in that respect constituted a binding modification of the original agreement, still the authorities are not in point, and are not available to the plaintiff in error to bring about a reversal of this case.

In the case of *United States vs. Freel*, *supra*, the contract in question contained this clause:

“* * * and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimate actual cost thereof, which the contractor shall receive if any * * *

The theory upon which the surety company is bound by alterations in the original contract is that the surety is a party to such contract or has delegated to the contractor, the authority to bind him in some way, and in the case cited, the clause, instead of according to the *United States*, the right to order such changes as it might desire, actually took away from the Government whatever authority it would have had in the absence of any clause concerning modifications, and the Supreme Court rightly held that the changes ordered by the department had the effect of discharging the surety.

In the case of *American Bonding Company vs. United States*, *supra*, the contract contained this

clause:

“If at any time it shall be found advantageous or necessary to make any change, alteration or modification, in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract.”

This clause also had the effect of depriving the Government of the right to order any changes or alterations, even in an immaterial matter, and depriving the Government of the benefit of the modern rule that changes or alterations in the original contract do not have the effect of discharging or releasing the surety, unless such change or alteration was actually prejudicial to him, or that his security was lessened or his liability increased. In the case at bar, however, a different condition exists. It is our contention as before suggested, that the contract, plans and specifications were all made of and constituted a part of the bond, by specific reference in the bond, and that the surety is bound by the terms of the contract as well as those terms found in the language of the bond itself, and that accordingly, the third sub-division of the contract found on page 67 of the record, is binding upon the surety, and that under the terms of that clause, no agreement was necessary either on the part of the contractor or the surety, but the power was conferred upon the county to “order” such alterations, deviations, additions or omissions not hereinabove provided for, from the contract specifications or plans, as it might

see fit. Under this agreement it was not necessary for any agreement in writing to be made altering the original contract and the legal effect of the contract was to constitute the bridge company the agent of the surety company to enter into and negotiate contracts for such alterations or deviations as the county might require, and therefore, throughout the whole transaction, the surety company was a party. It is also to be observed in this connection that there is no other provision in the contract in any wise restricting or limiting the operation of the clause in question, and unlike the federal cases cited above, the defendant in error would in any event be entitled to the benefit of the modern rule which has modified to a very great degree the old rule of *strictissimi juris*. In this connection, the fact must not be lost sight of that the only change, material or otherwise, to which the county was a party, is the change evidenced by the modified written contract, the performance of which by the contractor, was expressly and in terms guaranteed by the bond in question, and certainly it cannot be urged that a surety is discharged by an alteration, when the bond upon which he is sued was given for the very purpose of securing the faithful performance of the contract so altered.

COLLAPSE OF BRIDGE—DEFENDANTS THEORY AS TO CAUSE FANCIFUL AND UNTENABLE.

Under subdivision "V" pages 44-50 inclusive, counsel discuss the causes of the collapse of the

bridge and on page 46 they make the following remarkable statement.

“It certainly must be said that as to the piling sheared off, the complaint of the plaintiff that they had not been driven sufficiently deep must be disregarded because no matter how deep they would have, all they could have done was to shear off.”

On the same page counsel say “it seems to us that it is nothing but the rankest sort of conjecture for the witness Kenedy to attempt to make a case for the plaintiff by giving it as his opinion that the pier would not have toppled over if the piling had been driven to a point wherewith the blow of a two thousand pound hammer falling twenty feet the penetration would not have exceeded one inch.”

It is an old saying of mining men that no man can see in to the ground beyond the point of his pick and the information contained in counsel's brief to the effect that no matter how deep the piling was driven they were bound to shear off, is certainly illuminating, and argues a resourceful knowledge of the physical condition of the bottom of the Kootenai River, on the part of counsel that is astonishing to say the least. To the ordinary person it would seem that Mr. Kennedy's theory is sound and logical. His testimony was to the effect that the high water caused a scouring of the gravel around and under one end of the pier and on account of the fact that the pilings had not been driven to refusal that is to say through the loose and shifting gravel the scouring of the river bottom continued until the points of

the piling on one side of the pier were deprived of support. The result was that the pier toppled, slipped from its position and by reason of the ~~super~~^{super-imposed} weight of the concrete and bridge spans the piles sheared off.

Mr. Kennedy gave it as his opinion, based on a technical knowledge of bridge construction, that if the piling had been driven in accordance with specifications the undermining would not have occurred and the bridge would not have collapsed. It is only fair to assume as Mr. Kennedy apparently did assume that at some point below the point where the points of the pilings finally rested the piling if driven according to specifications would have passed through the loose shifting stratum of surface gravel and rested upon or penetrated solid gravel or rock in place below the zone of scouring or at a point where the character of the gravel or bed rock was such as to resist the scouring effect of the river. In that event the pier could not and would not have toppled even though the scouring continued down to the points of the piles.

It seems to us that counsel and not Mr. Kennedy are speculating as to the cause of the collapse and in any event by the failure of the Bridge Company to drive the piling to refusal we are deprived of the means of knowing positively and to a moral certainty what would have been the condition of the bridge at this time had the Bridge Co. performed its part of the contract.

We cannot refrain from again urging that so far

as the phase of the case is concerned plaintiff in error has been foreclosed by reason of the fact that they have not assigned the finding of the court in this respect as error and have not brought the evidence with respect to this phase of the case before the court for review.

In this connection it cannot be contended that the piling were not a sufficient length to permit the driving to refusal. The Trial Court at page 122 found that the excavation was about eight and a half feet deep in sand and gravel and that the piles were probably driven four feet and that the piling ordered by the superintendent were 22 feet long and "62 of them were driven, it would seem from depths varying from three feet five inches to three feet, eleven inches" and in this connection the court takes notice of the remarkable and significant fact (same page) that the water was gradually rising and although 62 piles were driven, the driving of each pile ceased when its top was practically at water level—in other words not the specifications nor the resistance which the pile met during the course of the driving controlled the question as to how deep each pile should be driven but that proposition seems to have been controlled entirely by the depth of the water in the cofferdam—in other words it is apparent that the Bridge Co., its employees and agents were not influenced by the plans and specifications but rather by a desire to avoid the splashing which would follow an attempt to operate the pile driver in the water contained in the cofferdam or the expense

or inconvenience of pumping out the cofferdam to permit of the unobstructed driving of the piles. There was nothing in the specifications which required the company to leave piles sticking up to the full height of the cofferdam and all the piling projecting above the excavation in the sand and gravel was available for further driving to the point of refusal. In fact the specifications required that after the driving of the piling were complete they should be cut off at an elevation of 24 inches above the bottom of the concrete piers and abutments. See Record p. 23.

Thus it will be seen that if the company had been disposed to drive the piling to refusal each 22 ft. pile could have been driven 18 ft. further before the contractor would have been required to resort to the use of a "follower" or additional piles in order to get the point down to the point of refusal.

It is also to be noted that the specifications (page 24) provide that if necessary the piles should be shod with steel or cast-iron shoes and properly ~~ar-~~^{ringed} ranged at the top to prevent their splitting or brooming, and that all piles broken, split, or badly broomed should be withdrawn and replaced by other piles.

The Record recites at page 97 "There was also evidence introduced on behalf of the plaintiff that piles were not driven to a point where under the blow of a two thousand pound hammer the penetration would not exceed a half inch and that the piles were not ~~arranged~~^{ringed} or shod and were broomed but little if any.

The court found these facts of the plaintiff in error (Record page 122).

AS TO THE EFFECT OF THE CLAUSE PROVIDING THAT THE CONTRACT SHOULD NOT GO IN TO EFFECT UNTIL THE PLANS AND SPECIFICATIONS WERE APPROVED BY THE SECRETARY OF WAR.

Under subdivision IV pages 44-4' inclusive counsel earnestly contend that the clause in the contract to the effect that the contract could not take effect until the plans and specifications should be approved by the Secretary of War, amounted to a condition precedent which the plaintiff must allege and prove before being entitled to a recovery.

It is not argued that the construction of the bridge by a state without such approval would amount to a nuisance or be an unlawful act. Hence we do not deem it necessary to quote from that long line of decisions of the Federal Court holding that the state has a right to construct bridges over navigable or unnavigable streams subject only to the paramount right to control interstate and navigable water for the purpose of Federal Commerce. We take it that counsel will concede that this right has always rested in the state and that unless the stream is shown to be navigable water of the U. S. no act of Congress was necessary to authorize the construction of the bridge and likewise the approval of the Secretary was unnecessary so far as the Federal government was concerned and that the act of Congress providing that whenever permission might

thereafter be granted to any person, by act of Congress, to construct a bridge the plans and specifications should be submitted to the Secretary of War for approval, has no application to a case where a state acting under the sovereign powers as such seeks to make available its public high-ways by the construction of bridges across the streams within its borders and we further assume that plaintiff in error will concede that the question of navigability or non-navigability under the Federal laws is a question of fact and that until the U. S. has taken the control stream over the presumption must prevail that it is not navigable water of the U. S. The Record in this case page 118 recites "and no evidence was offered or introduced by either of the parties touching the question of navigability or non-navigability of Kootenai River at the point where the Rexford bridge was constructed or elsewhere."

As we understand their present contention, the claim is made that by reason of the presence in the contract of the clause referred to we cannot recover unless we show by our pleadings and testimony that the approval of the department was had—regardless, absolutely, of the question whether the plaintiff in error was prejudiced by the failure to obtain such approval. We submit that this contention is without merit. There is absolutely nothing in the records which requires the County to secure the approval of the Secretary of War. As aptly suggested by the Trial Court at page 124 "Then to, so far as this action is concerned to secure such an approval

if not more was as much the contractor's as was the builder's. The former could not lawfully perform its contract prior to approval. A surety engages its principal, lawfully performed. And if the later unlawfully performs its contract unless the builder knew of and acquiesced in such unlawful performance. And upon the surety if the burden to approve this''.

The attention of the court is called to the fact that nowhere in the record was this question raised until, apparently, the case had proceeded to the point of argument and it then came too late. Be that as it may, counsel now make the curious contention that the surety was entitled to the benefit of the advice and opinion of an officer connected with the War Department of the United States and that the question whether this thirty thousand dollar bridge would be constructed all depended whether the War department would consent to examine the plans and specifications and place upon them its seal of approval. It is conceded that no evidence was offered touching the navigability or non-navigability of the Kootenai River and the presumption must prove that it is and was non navigable water. Assuming for the purpose of argument that the plans were not approved then according to defendant's contention the alleged contract was a nullity even though the stream was not navigable and the Secretary was without jurisdiction to examine or approve the plans, in other words the parties were placed in the anomilous position of having a perfect right to con-

struct the bridge but having the construction of the bridge defeated by reason of the failure of an official to approve the plans who had no right to either approve or disapprove them. It cannot be claimed that the parties at the time entered in to the contract were influenced by any such considerations as those contended for by plaintiff in error at this time. A contract based on the idea of securing action on the part of a high governmental department merely for the benefit of a private individual or corporation regardless of the governments interest in the subject matter would be contrary to public policy if it could not be characterized by even stronger terms.

There is nothing in the record or in the situation which justifies the contention that the Surety Co. could have been influenced by the desire to secure the benefit of the opinion of the Chief Engineer of the War Department. When it signed the bond it was influenced only by its confidence in the ability of the Bridge Co. to design and construct a proper bridge, by the premiums which it was paid for executing the bonds and by such indemnity as it may have taken over to protect itself against ultimate liability and on the part of the bridge Co. and the County the only consideration which could have influenced them or either of them in inserting the clause in contract was to protect the parties against loss, inconvenience or prosecution in the event it should turn out to be a fact that the Kootenai River at the point indicated was navigable water of the

U. S. and it may well be that the parties at the time believed that the government had jurisdiction over the stream. In pursuance of that belief they secured a passage of an act of Congress authorizing the construction of the bridge and we have a right to assume that the Bridge Co. as a matter of fact submitted to and obtained the approval of the War Department the plans and specifications under which the bridge was constructed.

But regardless of the question whether the plans were or were not approved the fact is that the Bridge Co. proceeded with the construction of the bridge to the point where it claims completion thereof. It received the warrants of Lincoln Co in full payment and it cannot now be heard to claim that it acted unlawfully. The Surety Co. undertook and agreed to the effect that the bridge Co. will lawfully carry out and perform each and every condition of the contract, plans and specifications. And having received all the material benefits of the contract it would be unconscionable to permit them to escape liability by the plea that the approval of the Secretary of war was not obtained especially when it is exceedingly doubtful *first* as to whether the approval was in fact obtained or not and *second* whether it was the duty of the County or the Bridge Co. to secure such approval.

The cases cited by counsel are not in point. Those cases relate to executory contracts and none of them were cases where the contract had been completely executed and the party raising the question had re-

ceived full benefit of the contract. The case of California Raisin Growers Asso. vs. Abbott, 117 Pacific 767, clearly, concisely and correctly states the rule applicable to this case.

“By their answers appellants aver that the contracts were delivered to plaintiff in escrow, and were not to become operating until 85 per cent of the raisin-bearing acreage of the state was secured by contract; that such percentage was never brought within the control of the plaintiff; and that therefore the contracts could not be enforced. A complete answer to this contention is that the growers did deliver their raisins under the contracts, and accepted money from the plaintiff. Even if delivery of the contracts in escrow, with the proviso alleged were tolerated (and it is not—Civ. Code, 1056, 1626, 1627), the acceptance of the terms of the contracts by the producers of raisins waived the escrow agreement.”

It cannot be successfully maintained that the purpose in the mind of the Surety Co. in having inserted in the contract the clause referred to was to secure the benefit of the Chief Engineer of the War Department since it must have known that the governments interest in the matter was only to see that the bridge was of such a character that when erected it would not obstruct navigation. There is no contention in this case either on the part of the plaintiff or defendant that the specifications were not complete in every respect. On the contrary, the evidence on both sides show that the plans and spec-

ifications were entirely sufficient to permit of the construction of a perfect bridge and one that would have stood had the specifications been carried out; particularly according to Mr. Raynor the man who drew the plans, the specification were left open as to the center pier so that it might be carried down indefinitely to the point of resistance and absolute security.

Respectfully submitted,

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No. 2825

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**
FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court
of the District of Montana.

Filed

OCT 18 1916

F. D. Monckton,
Clerk.

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I.

STATEMENT OF THE ISSUES

In the complaint filed by the County of Lincoln, the Coast Bridge Company, a corporation, and the National Surety Company, a corporation, are named as defendants, but the Coast Bridge Company was not served with summons and did not appear, and is not a party to the judgment in the case.

In the complaint it is alleged, in substance, that on the 18th day of December, 1911, the Coast Bridge Company entered into a contract with the County of Lincoln for the construction of a bridge across the Kootenai River, at Rexford, Montana, by the terms of which contract the Coast Bridge Company, for a stated consideration, was to construct the bridge according to certain definite plans and specifications, which were made a part of the contract.

It is further alleged in the complaint, in substance, that on February 5th, 1912, the County of Lincoln and the Coast Bridge Company made a further contract with respect to the bridge in question providing for certain modifications in the specifications, which were a part of the contract of December 18, 1911. The contract of February 5, 1912, together with the plans and specifications, which are made a part of said contract, are attached to and made a part of the complaint, marked exhibit "A." It is alleged in this connec-

tion that by the terms of such changed and altered specifications, the Coast Bridge Company agreed that piles, used in the construction of the bridge, should be driven with a hammer weighing not less than 2000 pounds and that the penetration under the last blow of such hammer, falling 20 feet, should not exceed one-half inch, and that, if necessary, such piles should be shod with steel or cast iron shoes and properly ringed at the top to prevent their splitting or brooming.

It is further alleged, in substance, that on December 18, 1911, in consideration of said contract, the Coast Bridge Company and the National Surety Company executed and delivered to the County of Lincoln their obligation in writing, in the penal sum of \$30,000.00, conditioned that if the Coast Bridge Company should faithfully observe and comply with all the terms and provisions in said contract, and the changed and altered plans and specifications mentioned, and should well and faithfully perform all matters and things by them undertaken to be performed under said contract, then the obligation should be null and void, otherwise to be and remain in full force and effect. A copy of the bond referred to is attached to and made a part of the complaint, marked exhibit "B."

It is further alleged, in substance, that during the construction of the bridge in question the County of Lincoln paid to the Coast Bridge Company \$30,000.00 according to the terms and condi-

tions of said contract and specifications thereto annexed, but that said payment was made without knowledge, on the part of the County or any of its officers, that the bridge was not being constructed in accordance with said contract and the plans and specifications; it is alleged that the failure on the part of the Coast Bridge Company to construct the bridge in accordance with such contract and specifications was a fact wholly and exclusively within the knowledge of the defendant Coast Bridge Company and that the plaintiff, its officers and agents, had no knowledge, or means of knowledge, of such failure on the part of the defendant Coast Bridge Company; it is alleged that the plaintiff could not, by the exercise of reasonable, or any diligence, have discovered or known of the defective construction of said bridge until after each and all of the payments had been made to the Bridge Company. It is further alleged in this connection that the Coast Bridge Company, with intent to deceive and defraud the County, pretended that such bridge was constructed in accordance with said contract and specifications and the County, wholly relying upon such false and fraudulent representations, made such payments.

It is alleged, in substance, that the Coast Bridge Company failed and neglected to drive the piling with a hammer weighing not less than 2000 pounds, falling 20 feet, so that the penetration at the last blow did not exceed one-half inch, but,

on the contrary, so drove such piling that at the last blow thereof, in each and every one of such piling for the middle pier of said bridge, would have been driven at least six inches with a hammer weighing 2000 pounds and falling 20 feet, and that by reason of the failure and neglect of the Coast Bridge Company to drive said piling in accordance with the terms of said specifications, the foundation of the middle pier became, and was at all times, insecure and unsafe, and by reason of the bottoms resting on insecure and shifting gravel and sand, occasioned by the Coast Bridge Company's failure to drive such piling in accordance with such specifications, the foundation of said middle pier was placed in great danger of being undermined and destroyed, and that thereafter, in the spring of 1913, by reason of the failure and neglect of the Coast Bridge Company as aforesaid, said center pier was washed away and destroyed, and the entire bridge structure resting thereon entirely collapsed and rendered useless by no fault of the County, and to the damage of the County in the sum of \$30,000.00.

The record shows that in the course of the trial it was stipulated that the plaintiff might amend its complaint, making the original contract of December 18, 1911, and the contract of February 5, 1912, a part of the complaint and attached them thereto as exhibit "A."

The National Surety Company filed an answer wherein the allegations of the complaint were both

generally and specifically denied, except the National Surety Company admitted the execution of the bond, exhibit "B," which was attached to plaintiff's complaint.

The case was tried upon the issues joined between the County of Lincoln and the National Surety Company, and judgment rendered on April 11, 1916, against the National Surety Company in the sum of \$29,345.40, together with costs.

II.

THE EVIDENCE

The evidence in the record on the questions presented upon this appeal shows:

1. That on December 18, 1911, the Coast Bridge Company and the County of Lincoln made a written contract for the construction of a bridge across the Kootenai River, at Rexford, Montana, according to certain plans and specifications, which were attached to, and made a part of, the contract. (Pgs. 63-85.)

(a) The contract of December 18, 1911, contained the following provision:

"The Bridge Company promises and agrees to furnish the material fabricated and erected for a two span riveted bridge over the Kootenai River, at Rexford, Montana, together with three concrete piers, * * * as per plans and specifications above referred to and hereto attached." (Pg. 64.)

(b) "The Bridge Company promises and

agrees to furnish and construct in place any additional concrete required in said piers, below water, for \$15.00 per cubic yard, and any additional concrete required in said pier above water for \$10.00 per cubic yard. It is further agreed and understood that should the County deduct any concrete from said piers, which is hereby made optional with said County, the Bridge Company will allow the County the sum of \$13.00 per cubic yard for all concrete so deducted below water, and the sum of \$8.00 per cubic yard for all concrete deducted above water.” (Pgs. 64-65.)

(c) “It is further agreed and understood that should piling be required under any of the piers, the price to be paid for said piling shall be 40 cents per lineal foot, and the length of such piling shall be specified and determined by the County or its representatives.” (Pg. 65.)

(d) “The Bridge Company hereby covenants and agrees and promises to and with the County to build the said bridge and all its parts in accordance with the plans, drawings and specifications hereto attached, and made a part of this contract, designated as plan ‘A’ Sheets numbers 1 and 2.” (Pg. 65.)

(e) “The Bridge Company promises and agrees to begin the construction of said bridge on or before the first day of August, 1912,

and to complete the construction of said bridge on or before the first day of May, 1913.” (Pg. 65.)

(f) “The Bridge Company promises and agrees to furnish an indemnifying bond in the sum of \$30,000.00 with the National Surety Company as surety thereon for the faithful performance of this contract, and such bond shall be accepted by the County before this contract shall be in force and effect.” (Pgs. 65-66.)

(g) “The Bridge Company promises and agrees to submit to the County for approval the shop drawings of the steel parts and members of said bridge.” (Pgs. 66-67.)

(h) “Should the County at any time order alterations, deviations, additions or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.” (Pg. 67.)

(i) “And the said County does hereby promise and agree with and to the Bridge Company that when the said bridge is completed the County will, in consideration of the covenants and agreements being strictly performed and kept by the Bridge Company, as specified herein, well and truly pay, or cause to be paid

unto the Bridge Company the sum of \$24,-252.00 in the manner following: Upon the completion of the concrete piers 25% of the above mentioned price. Upon the arrival of the steel for the aforesaid bridge at the bridge site 50% of the above mentioned price. Upon the completion of the bridge the remaining 25% of the above mentioned price within 30 days after the acceptance of the bridge by the County.” (Pgs. 63-64.)

(j) “It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the same shall have been granted by the Congress of the United States.” (Pg. 65.)

The specifications provide:

(a) “For two 200 foot riveted spans resting on one stream pier and two shore piers, together with the necessary wooden approaches. Plan ‘A’ Sheet ‘1.’” (Pg. 70.)

(b) “All approaches and spans shall be of such length as the local engineer may designate, but no approach shall have a greater grade than 5%, * * * These approaches shall have the piles, and caps and joists called for on the accompanying plans.” (Pg. 74.)

(c) "Piles are to be cut from live trees, and not to be less than 12 inches at the large end and not less than 9 inches at the small end, * * * if found necessary in driving all piles shall be shod with steel or cast iron shoes to prevent their splitting or crushing under rapid blows of the hammer." (Pg. 76.)

(d) "The piers and abutments shall be sunk to the elevation called for on the plans, * * *

"After excavation is made to the full depth; piles shall be driven inside if so ordered by the engineer." (Pg. 82.)

(e) "All piles shall be called for under specifications and shall be of the length called for on the plans, or of any length necessary to fulfill the following specifications as to driving:

"Piles shall be driven with a hammer weighing not less than 2000 pounds, and penetration under the last blow of the hammer falling 20 feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast iron shoes, and properly ringed at the top with wrought iron rings to prevent them from splitting or brooming. All piles which are broken, split or badly broomed and **in the opinion of the engineer are not satisfactory, must be withdrawn and replaced with other piles to the satisfaction of the engineer or inspector in charge.**" (Pg. 84.)

(f) "All work either described or shown herein shall be executed with good material and in good workmanlike manner and shape, acceptable to the Board of County Commissioners of Lincoln County, Montana, or their duly authorized representative." (Pg. 85.)

2. The complaint and the record each fail to show any bond executed by the Coast Bridge Company for the performance of the contract of December 18, 1911, otherwise than the recital in the bond given on December 20, 1911, wherein it is recited that the bond heretofore furnished by the Coast Bridge Company shall be null and void and of no force and effect after the filing of the bond of the date of December 20, 1911. (Pgs. 27-28.)

3. The evidence shows that on December 20, 1911, the Coast Bridge Company as principal and the National Surety Company as surety executed a bond in favor of the County in the penal sum of \$30,000.00; this bond is attached to and made a part of plaintiff's complaint, marked exhibit "B," (Pg. 26), and contains the following material recitals on this appeal:

(a) "Whereas, the Board of County Commissioners of Lincoln County have, since the 18th day of December, 1911, changed and altered the original plans and specifications of the details for the erection of said bridge at Rexford, Montana, and the Coast Bridge Company, the principal herein, has made and en-

tered into a new contract with the County of Lincoln, Montana, in accordance with the changed plans and specifications, and by the terms, conditions and provisions of which the said Coast Bridge Company, the principal herein, is to and shall furnish all labor and material and do certain work, to-wit: For the erection complete of a two span riveted bridge over the Kootenai River at Rexford, Montana, with three concrete piers; also the lumber and railings for said spans and all other material, all strictly in accordance with the amended and changed maps, plans and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof.” (Pg. 27.)

- (b) “Whereas, the Board of County Commissioners have by an order duly made, ordered that the Coast Bridge Company file a new bond and undertaking in the sum of \$30,000 conditioned for the faithful performance by the said Coast Bridge Company of all conditions of that certain contract entered into by and between the Coast Bridge Company and Lincoln County, Montana, in accordance with the amended plans and specifications, and that the bond heretofore furnished by the Coast Bridge Company shall be null and void and of no force and effect after the filing of the within obligation.” (Pgs. 27-28.)

(c) The bond recites that if the Coast Bridge Company, the principal, shall faithfully observe and comply with the terms, conditions and provisions of said contract, and the changed and altered plans and specifications mentioned, etc., * * * then the obligation shall be null and void. (Pg. 28.)

4. The evidence shows that on February 5, 1912, a further contract was made by the Coast Bridge Company and the County of Lincoln with respect to the bridge in question. This contract is set out as a part of the complaint, marked exhibit "A". (Pgs. 8-9.)

This contract recites:

(a) That there was a contract made on December 18, 1911, for the construction of a steel bridge at Rexford, Montana, and that the County had decided to alter the dimensions of the bridge and increase its length, which necessitated alterations in the construction of the bridge.

(b) "The Bridge Company promises and agrees to alter and extend the bridge aforesaid, and to make all alterations, extensions and enlargements, and to erect and construct the said bridge in accordance with plans, drawings and specifications to be hereafter submitted by the Bridge Company to the County, and which said plans, drawings and specifications shall become, upon acceptance by the County, a part of said contract of De-

cember 18, 1911, and shall be annexed thereto and marked Plans for Rexford Bridge, and shall be substituted for the plans, drawings and specifications heretofore made a part of the contract of date December 18, 1911.” (Pgs. 8 and 9.)

(c) “It is covenanted and agreed by the Bridge Company and the County that this contract shall become operative and effective upon the submission of the plans, drawings and specifications herein first mentioned to the County and the approval or acceptance of the same by the County, and not before.” (Pg. 9.)

(d) The contract provides for additional compensation to be paid the Bridge Company in the amount of \$3,487.00. (Pg. 9.)

The specifications which were to be later prepared and furnished by the Coast Bridge Company called for two 220 foot pin connected spans. (Pg. 11.)

The complaint and record fails to show any bond given by the Coast Bridge Company for the faithful performance of this contract of February 5, 1912; and the complaint and record fail to show that any bond was furnished at the time the contract of February 5, 1912, was made, or subsequent to that time, and the bond of December 20, 1911, by its terms excludes any obligation on the part of the surety for the performance of the con-

tract of February 5, 1912, or for the construction of any other bridge than the one referred to in the bond in accordance with the plans and specifications made a part of the bond obligation. The bond of December 20, 1911, by its terms excludes any obligation for the construction of the bridge under the original contract of December 18, 1911; providing expressly by its terms for the construction of the bridge under a **new** contract so named in the bond, but not the altered and modified specifications which are made a part of the bond; with the further express recital that the bond given by the National Surety Company for the performance of the original contract of December 18, 1911, should be cancelled.

There is no allegation in the complaint with respect to the terms and conditions of the new contract and the modified plans and specifications for the construction of the bridge at Rexford under the bond of December 20, 1911, and no evidence was offered, and the record is silent as to the contents of such contract and the specifications for the bridge thereunder.

The defendant bond company in this case is sued upon a bond obligation given for the performance of a contract, the terms and conditions of which are not disclosed by the pleadings or the evidence, and it is sued upon a contract of a subsequent date to the date of its bond with no connecting link between, the contract for which the

bond was given, and the contract on account of which the Bond Company was sued.

5. The contract of December 18, 1911, shows that the bridge contracted for was to consist of two 200 foot riveted spans, resting on three concrete piers. (Pg. 64.)

6. The defendant's bond under date of December 20, 1911, which is made a part of the plaintiff's complaint and sued upon in this case, recites that the bridge to be built or constructed under the "new contract" in accordance with the changed plans and specifications was a two span riveted bridge, resting on three concrete piers. (Pg. 27.)

7. The evidence in the case shows that the bridge constructed under the contract of February 5, 1912, consisted of two 220 foot pin connected spans, resting on one concrete pier and two shore tubular piers. (Pg. 11.)

8. The evidence shows that the location of the concrete stream pier was changed by the County after the construction of the bridge had been entered upon, and by order of the County the concrete stream pier was placed 16 feet further out in the stream where the river "had a bigger sweep at the pier;" (Pg. 106.); that when the County ordered this change in the location of the concrete stream pier the Bridge Company advised the County in writing, that the change in the location of the pier was more expensive than beneficial, but that if the County insisted upon the change the

Bridge Company would “proceed under force account” in the construction of the pier at the new location (Pg. 110); and after such notice, and presumably with such understanding, the pier was constructed by the Bridge Company at the new location. The construction of the pier at the new location if proceeded with under force account, would not fall within the terms of the contract or the obligations of the bond.

9. The contract of December 18, 1911, as well as the contract of February 5, 1912, shows:

(a) That the extent of the excavation for the piers was not definitely fixed on the plans or in the specifications but was left open for determination when the actual conditions should be known and provision was made in the contract for payment at so much a cubic yard for the concrete used in the excavation. (Pg. 23.)

(b) The plans and specifications were also left open on the question as to whether piling should be used in the foundations for the piers and the provision made that if piling were ordered by the engineer (Pg. 23) the County should pay 40 cents per lineal foot for the piling used; and the length of such piling should be specified and determined by the County, or its representatives. (Pgs. 64-65.)

The County reserved complete charge over the construction of the bridge down to the approval of the shop drawings for the steel parts and mem-

bers of the bridge (Pgs. 66-67); and reserved to itself the right to determine the extent that concrete would be used in the base of the piers by providing a unit price for such concrete, and providing for a unit price if piling were used in place of the concrete. The Bridge Company could not, under any fair construction of the terms of the contract, determine the extent to which the concrete should be carried down in the base of the pier, or whether the cheaper piling construction should be used. The piling are shown (Pg. 102) to have cost the County \$686.40, while the concrete to a depth of safety would have cost about \$3000. The County by the terms of the contract did not leave it optional with the Bridge Company to determine which should be used, but reserved that authority to itself. The Bridge Company proceeded with the work of the foundation in the stream pier under the direction of the County, and was obliged to await the orders of the County, and await the inspection of the piling used in the foundation, after they were in place, before the concrete should be placed thereover. (Pg. 107.) The County, as shown by this record, was in control and the Bridge Company proceeded from time to time under the orders of the County.

10. The evidence shows that the piling used in the foundation for the center pier were 22 feet in length and were 8 inch square piling (Pg. 94); and that 62 piling were used; while the alternate plan for the bridge in case piling were used show-

ed the location of 38 piling in the pier.

The record shows that piling 22 feet long 8 inches square embedded 4 feet in the ground would sustain a weight of approximately 30,000 pounds, and that a 2000 pound hammer falling 20 feet would strike 40,000 pounds to the foot or 800,000 pounds, which would be 400% greater than the piling used would stand. (Pgs. 104-105.)

The plaintiff sought to show that the direct cause of the collapse of the bridge was the undermining of the concrete stream pier by the washing of the river. (Pg. 96.)

It was the plaintiff's theory that after the water had cut under the concrete in the base of the pier to a point beyond the center of the pier, the pier began to lean up-stream, and as the water continued to cut under the concrete, the pier gradually tipped up-stream until the weight of the pier sheared off the piling in the base. The evidence shows that all of the piling were sheared off by the concrete in the base of the pier, except 16 piling on the down-stream side, and the 16 piling were not pulled out, but were left protruding out of the concrete a distance of about 3 feet 8 inches. (Pg. 94.)

11. The record shows that the County and the Bridge Company, without the knowledge, consent or approval of the Bond Company, on July 26, 1912, changed the contract of December 18, 1911, with respect to the payment for the bridge, and

that the Board of County Commissioners by a formal resolution, modified the terms of said contract with respect to the payment for the bridge. (Pgs. 87-90.)

The resolution refers to a bridge to be constructed by the Coast Bridge Company near Troy, Montana, as well as the one to be constructed near Rexford, Montana, and modified the contracts for each of the said bridges. The resolution recites:

“Whereas, the Board of County Commissioners have made certain alterations in the plans of the bridge to be erected across the Kootenai River near the village of Rexford, and

“Whereas, each of the contracts (referring to the contract for the bridge at Troy and the bridge at Rexford) aforesaid provide for the payment of certain sums of money upon the completion of certain portions of said work, and * * * (Pg. 88.)

“Whereas, the Coast Bridge Company has furnished good and sufficient bonds in the sum of \$65,000.00 with the National Surety Company of New York as surety, conditioned for the performance of the terms and conditions of each of said contracts (Pg. 89), and

“Whereas, the Coast Bridge Company are prosecuting said work in the construction of said bridges;

“Therefore, Be It Resolved, that the terms and conditions of each of said contracts inso-

far as the payments owing and due under the said contracts, shall be changed and altered to the following manner (Pg. 89):

* * *

“Be It Further Resolved that this resolution shall be effective and become a part of the original contracts after the Coast Bridge Company shall have signed their acceptance and waiver of the change of the terms of the original contracts as herein specified and referred to.” (Pg. 90.)

The County and the Bridge Company thus without the knowledge or consent of the Bond Company modified the provisions of the original contract with respect to the terms of payment, and by the resolution above referred to authorized the payment of \$12,500.00 in advance (Pg. 90). This payment was made by the County under date of July 26, 1912 (Pg. 99), and a further payment made by the County to the Bridge Company in the amount of an additional \$12,500.00 under date of October 21, 1912. (Pg. 100.) These payments were made before the work was done. The first payment of \$12,500.00 was made before the work was commenced. The record shows that the Bridge Company started work on the Rexford bridge on September 21, 1912 (Pg. 105); the payment of \$12,500.00 was made July 26, 1912 (Pg. 99). The record shows that the work was commenced on the construction of the center pier October 10, 1912 (Pg. 105), and the work on the

center pier was completed during the week ending December 14, 1912 (Pg. 110); and that on October 21, 1912, an additional sum of \$12,500.00 was paid, making a total of \$25,000.00 paid on the bridge up to October 21, 1912.

The record shows that the bridge was completed December 31, 1912 (Pg. 110).

The record shows that on December 28, 1912, the Board of County Commissioners formally accepted the bridge in question (Pg. 92), and made the final payment (Pg. 93).

The record shows that the contract was prepared by the County Attorney (Pg. 102), and that the information obtained for drawing the plans was obtained from the County Engineer of the County of Lincoln, and based upon a profile prepared by him (Pg. 104), and that John M. Duthie was the County Engineer (Pg. 98), who did not give so much attention to the work during construction as he did in the preliminary steps to the location of the bridge and the data in making designs (Pg. 98); that after the excavation had been made for the center pier to a depth of 8 feet 6 inches the Bridge Company notified the Commissioners, and Mr. Duthie, the County Engineer, came out and measured the excavation (Pg. 106); the Bridge Company then drove the piling, 62 in number (Pg. 106), which were inspected by the Commissioners (Pg. 106). The Bridge Company was requested not to put in any concrete in the base for the center pier after the piling had been

driven until the Commissioners were notified and could inspect the piling that had been driven (Pg. 107).

The plaintiff offered testimony to show that the Commissioners relied upon the judgment of the Bridge Company, and offered testimony tending to show that the Commissioners exercised no independent judgment in the matter at all, resting their performance of duty upon the statement that the Bridge Company had represented to the Commissioners that they were competent Bridge Engineers, and that if piling were necessary they would so advise the Commissioners, and the statement was made by Commissioner Pratt that: "We relied on their judgment and allowed them to proceed with the construction of the pier in the manner which they thought was dictated by their best judgment" (Pgs. 97-98).

The record shows the participation of the County in the preparation of the contract, bond and the plans and specifications, and the preparation of the data by the County from which the plans and specifications were drawn, and the presence of the County Engineer and the Commissioners from time to time during the course of the construction of the bridge, and the direction of the Commissioners particularly with respect to the location and construction of the center pier, and the inspection of the piling used in that pier. The record also shows the position taken by the County upon the trial, that the Commissioners exercised

no judgment in the matter whatever, but relied upon the judgment of the Bridge Company and allowed the Bridge Company to proceed with the construction of the pier in the manner it saw fit. The terms of the contract imposed upon the County the duty of direction and inspection in the course of the work and reserved to the County the duty of determining whether piling should be used in the foundation of the pier; and reserved to the County the right to determine to what extent concrete should be used in the excavation for the pier. By the terms of the contract these duties were contract duties resting on the County and became a part of the contract obligations of the County to the Bond Company. If the bridge failed by reason of failure in any respect on the part of the County to discharge this duty, which it contracted to discharge, it would not be in a position to enforce an obligation against the bond for the failure of the Bridge Company to discharge an obligation which the County was to discharge. The matter of whether or not piling was to be used in the foundation of the pier was not determined by the contract, or by the plans and specifications. The matter of whether piling would be used was left to be determined as the work proceeded after excavation had been made and the conditions were known.

The terms of the bond would not cover a failure either on the part of the Bridge Company or the County to correctly determine whether piling

should or should not have been used. Nor would the terms of the bond cover a failure on the part of the County and the Bridge Company to correctly determine to what extent concrete should be used in the excavation for the base of the pier. Or to correctly determine whether concrete should be used exclusively in the base of the pier. If the County, by the terms of the contract, owed any duty to determine these matters properly, and owed any duty to properly inspect the work to see that it was done as required and the County failed to properly do so, it cannot complain and hold the Bond Company for a failure of the bridge because of improper construction, with respect to such matters.

12. The contract made a part of the complaint recites:

That it is not to take effect until the War Department shall have approved the plans and specifications for the bridge (Pg. 66).

There is no allegation in the complaint that such approval was secured; and there is no evidence in the record that such approval was secured. The change in the location of the bridge and center pier was made under the verbal direction of the Commissioners without any formal change being made in the plans, so that the matter could not receive the attention of the War Department (Pg. 105).

The center pier was the one which failed and this change was made without any modification in

the plans, precluding any possibility of a presumption that the War Department approved the location of the pier, and the change in the location of the pier was a material fact in connection with the failure of the bridge. The record showing with reference to this change the following:

“It would throw the pier that was not quite in the center of the river, further out in the center of the river, and the river swirling around this way, would have a bigger sweep at the pier than it would have if it had been left 10 feet further away to the Rexford shore” (Pg. 106).

The Bond Company, if contracting for the performance of the contract of December 18, 1911, could not be held by the County if the approval of the War Department had not been secured because by the terms of the contract it was not to become effective until that approval was secured. The War Department presumably would exercise some judgment as to the proper location of the pier in the river, in order to protect the rights of the Government and the public upon navigable streams. The Government, presumably, would not sanction a change in the location of a pier to a position where it would be more exposed to dangers from the river, and where such dangers could be avoided and the bridge properly constructed with the pier located at another point. The Bond Company would have a right to the

judgment of the War Department if the contract was conditioned that that judgment should be secured.

13. The contract of February 5, 1912 (Pg. 9), provides that it shall not become operative or effective until the submission of plans, drawings and specifications to the County and the approval and acceptance thereof by the County. This contract by its terms provides for a complete new set of plans and specifications to be prepared by the Bridge Company and later submitted to the County for its acceptance and approval. This substitution of complete plans and specifications was without the knowledge, consent or approval of the Bond Company. The contract and the new plans and specifications were made as of date February 5, 1912; the bond in question as of date December 20, 1911, and has to do with the performance of a particular contract referred to in the terms of the bond.

III.

ASSIGNMENTS OF ERROR

The National Surety Company on May 29, 1916, presented and filed with its petition for a Writ of Error (Pgs. 128-131), the following assignments of error:

1. The District Court of the United States, for the District of Montana, erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of

its complaint as amended, which objection was based upon the ground that said complaint as amended does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for judgment in its favor.

3. The said court erred in holding and deciding that the complaint as amended states a cause of action.

4. The said court erred in holding and deciding that the change and modification in the contract, as made by the resolution of July 6, 1912, and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant the National Surety Company from the liability provided for in the bond furnished by said Surety Company.

5. The said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the plaintiff having made payments of the contract price to the Bridge Company before said payments were due according to the contract between said plaintiff and said Bridge Company.

6. The said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge,

which constituted material departures from the plan for the construction of the bridge, adopted by the contract between said plaintiff and the Bridge Company.

7. The court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding there is neither allegation nor proof that the plans and specifications for the bridge had been approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said Department.

8. The court erred in holding and deciding that the plaintiff was entitled to recover, notwithstanding the failure of the plaintiff to appoint an engineer or inspector to supervise and superintend the work of construction of said bridge and by failing to take any precaution to insure the performance of the contract with said Bridge Company.

9. The court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a "two span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two span pin connected bridge with one concrete and two tubular piers."

10. The court erred in rendering judgment for the plaintiff.

IV.

POINTS AND AUTHORITIES ON THIS APPEAL

1. The complaint does not state a cause of action.

(a) It is not alleged in the complaint that the plaintiff performed its part of the contract.

There were mutual obligations on the contract-
ing parties imposed by the terms of the contract.
There were certain obligations imposed directly
upon the County, and the failure to discharge
them would result in a failure of consideration
for obligations assumed by the Bridge Company
under the terms of the contract. It was essential
that the County allege that it had performed the
terms of the contract on its part to be performed.
It would have been sufficient if the County had
alleged in general terms the performance of the
conditions of the contract on its part to be per-
formed. There was no special or general allega-
tion in the complaint of the performance of the
conditions of the contract on the part of the
County.

(b) It is not alleged that the War Department
of the United States approved the plans and speci-
fications for the bridge. The contract by express
terms provides that it should not take effect until
the War Department of the United States had
approved the plans and specifications.

This requirement by the terms of the contract
was made a condition precedent. The rule is well

settled that the plaintiff must allege the performance of precedent conditions in seeking to recover on a contract containing such conditions.

In *Encyclopedae of Pleading & Practice*, Vol. 4, 627, it is said:

“A condition precedent calls for the performance of some act, or the happening of some event, after the terms of the contract have been agreed upon, before the contract shall take effect; that is to say, the contract is made in form but does not become operative as a contract until some thing or act is performed before some subsequent event occurs.” (627.)

“While a condition that qualifies or defeats the plaintiff’s claim, being a condition subsequent, may be safely ignored by the plaintiff in his pleading, it may be stated as a general rule that performance by the plaintiff of a precedent condition must be averred in the complaint or declaration.” (628.)

“The performance of a condition precedent to be executed by one other than the plaintiff must likewise be averred.” (629.)

“In lieu of allegations of performance the plaintiff may allege facts in excuse of non-performance.” (629.)

“It is provided by statute in many of the states that in pleading performance of conditions precedent in a contract, it is not necessary to state the facts constituting perform-

ance, but the party may state generally that he duly performed all the conditions on his part." (633.)

"The legal effect of the general averment is that the plaintiff has specifically performed each and every act and thing required by the terms of the contract upon which the action is brought." (634.)

"Performance by a third party not the plaintiff in the case nor necessarily a party to the contract, may be averred in general terms under such statutes." (634.)

"The use of the general averments as so authorized is optional and the plaintiff is at liberty to allege performance by stating the facts which constitute it, but if he undertakes to make a specific allegation of performance he must make it with particularity and the strictness required by the rules of the Common Law." (635.)

In *Rockford Insurance Co. vs. Nelson*, 65 Ill. 415, the court say in the syllabus:

"When precedent conditions are not set out in the declaration, there will be such a variance as to exclude the contract or obligation as evidence."

In *National Surety Co. vs. Schneidermann* (Ind.), 96 N. E. 955, in the syllabus the court say:

"When the terms of a surety contract are made conditions precedent to the obligees

right of recovery, compliance therewith must be alleged and proven by the obligee, or a judgment against a surety cannot be supported upon special findings which do not expressly find performance or waiver of conditions precedent."

In *Texarkana & Ft. S. Ry. Co. vs. Parsons*, 74 Fed. 408, the court say in the opinion at page 411:

"There was not only no suggestion that the Secretary of War had approved the narrowing of the openings on each side of the pivot pier, but it does not appear that he approved the location of the bridge or the plans, or any plans whatever, relating to its construction. Indeed, for anything contained in the record before us, this bridge was constructed in entire violation of law. * * *

The Act of Congress is mandatory, that 'the bridge shall not be built' until certain things have been done. The complaint avers that these things were not done, but there is no evidence in the record tending to show that they were done, and in the absence of proof there is no presumption that they were done."

(c) The bond of the National Surety Company of December 20, 1911, is made a part of the complaint, marked exhibit "B."

This bond contains three important recitals going to the question of the sufficiency of the complaint, viz:

(1) That a contract had been made between the County and the Bridge Company under date of December 18, 1911, and a bond had been furnished under that contract.

(2) That changes had been made in the plans and specifications and a new contract with changed plans and specifications had been made by the County and the Bridge Company, and a new bond was to be given.

(3) That by order of the Commissioners the bond for the performance of the contract of December 18, 1911, was cancelled and a new bond for the performance of the new contract was ordered to be given.

The contract of February 5, 1912, is attached to and made a part of the complaint, but there is no allegation in the complaint showing that by the terms of the new contract referred to in the bond, for the performance of which the bond was given, it carried any obligations on the part of the Bond Company for the performance of the contract of February 5, 1912. The bond by its terms shows that it was given for the performance of one contract, the terms and conditions of which are not disclosed by the complaint nor the evidence.

So by the recitals of the bond, made a part of the complaint, it appears that the bond given for the performance of the contract of December 18, 1911, was cancelled and a new bond taken for the performance of a new contract with changed plans

and specifications. The new contract with the changed plans and specifications and the obligations of the parties thereto are not made a part of the complaint, nor are the conditions of such "new contract" stated in the complaint, nor was such contract offered in evidence.

(d) It is not alleged that the National Surety Company had any knowledge of, consented to or approved the altered or modified plans and specifications for the contract of February 5, 1912.

If the bond, exhibit "B," was given for the performance of the new contract with the changed plans and specifications and if the bond given for the performance of the contract of December 18, 1911, was cancelled the plaintiff cannot use the provisions of the contract of December 18, 1911, to aid in stating a liability on the new bond given for the performance of the new contract under date of December 20, 1911.

The plaintiff depends upon a provision in the contract of December 18, 1911, authorizing changes or alterations in the plans and specifications to hold the Bond Company for the results of construction under changed plans and specifications without the Bond Company's knowledge, consent or approval. The terms of the contract of December 18, 1911, are a part of the complaint and the provision relied upon by any fair construction would not justify the important changes sought to be made wherein the character of the

bridge, the length of the bridge, and the location of the concrete pier in the center of the bridge were all changed. And further, where the plaintiff comes forward with a contract of February 5, 1912, made a part of its complaint which by its terms provides for a complete set of new plans and specifications for the bridge to be later presented by the Bridge Company for the consideration and approval of the County. A provision in the contract of December 18, 1911, for alterations or modifications in the plans and specifications could not be extended to the point where the parties would be authorized to provide for complete new plans and specifications. The complaint shows upon its face that complete new plans and specifications are made a part of the contract of December 18, 1911, but this was done without the knowledge, consent or approval of the Surety Company, and without any allegation in the complaint of any knowledge, consent or approval on the part of the Surety Company. By the act of the County and the Bridge Company according to the allegations of the complaint embodying the provisions of the two contracts, the County and the Bridge Company did away with the provision in the contract of December 18, 1911, for alterations or amendments by doing away with the contract and substituting another one for it, but rely upon authority to substitute the contract of February 5, 1912, for the old and the new plans and specifications for the old under the terms of the

old contract authorizing alterations and modifications in the plans and specifications.

The contract of December 18, 1911, was not made a part of the complaint until during the course of the trial, when it was added to the complaint by amendment and upon stipulation of the parties. (Pg. 61.)

With the recitals in the two bridge contracts and the two sets of plans and specifications made a part of the complaint, and with the recitals in the bond given for the performance of still another contract, which is not made a part of the complaint, and the conditions and stipulations of which are not made known to the court, we submit that the complaint fails to state a cause of action against the Bond Company for failure to build the bridge as it is alleged according to the contract of December 18, 1911, with modified plans and specifications of February 5, 1912.

2. The Bond Company is released from any obligation to the County because the County and the Bridge Company, without the knowledge, consent or approval of the Bond Company, changed the contract for the construction of the bridge in question.

(a) The County and the Bridge Company without the knowledge, consent or approval of the Bond Company changed the contract as to the character of the bridge to be built from a two span 200 foot riveted steel bridge, resting on three con-

crete piers to a two span 220 foot pin connected bridge, resting upon one concrete pier and two tubular shore piers.

(b) The County and the Bridge Company without the knowledge, consent or approval of the Bond Company changed the location of the center concrete pier, moving it farther out into the stream in a more dangerous position by order and direction of the County without the knowledge, consent or approval of the Bond Company its location was so changed that "it would throw the pier that was not quite in the center of the river further out in the center of the river, and the swirling around this way would have a bigger sweep at the pier than it would have if it had been left 10 feet further away to the Rexford shore."

The bond attached to the complaint recites that it was given for the performance of a new contract for the erection complete of a two span riveted bridge over the Kootenai River at Rexford, Montana, together with three concrete piers.

The County with the Bridge Company changed completely the plans and specifications for the bridge in question, substituting entirely new plans and specifications; and changed the kind of a bridge, the length of the bridge, and the location of the bridge, all without the knowledge, consent or approval of the Bond Company, and still seek to hold the Bond Company for a failure to have the bridge constructed according to the contract of

December 18, 1911, with the modified plans and specifications of February 5, 1912.

The courts have quite generally held that a material change or departure in the contract or in the performance of it made by the principals of the contract without the knowledge, consent or approval of the surety would release the surety from any obligation for the performance of the contract according to its terms. But here we have the extreme situation of an entirely new set of plans and specifications for the work and a new contract with additional compensation in the amount of \$3,487.00 provided for. It must be presumed that the additional compensation is because of additional construction required. The contract of December 18, 1911, fixed by definite plans and specifications the kind of a bridge to be built; fixed the compensation to be paid therefor, and the terms with respect to such payment; and fixed the time limit within which the bridge was to be built or completed, specifying that the work should be commenced not later than the first of August, 1912, and the bridge completed on or before the first of February, 1913. (Pg. 65.)

The contract of February 5, 1912, with the new plans and specifications which were to be later furnished by the Bridge Company, and which were to be substituted for the plans and specifications under the contract of December 18, 1911, provides for the additional consideration of \$3,487.00 but

does not change the time limit within which the additional work must be done.

The record shows that the plaintiff assigned as the cause for the failure of the bridge that the foundation of the center pier was not properly constructed, and that the water cut under the concrete in the base of the pier, and that the piling were not sufficient, or had not been sufficiently driven to carry the weight of the pier and bridge, so that the court meets the situation of a complete change in the plans and specifications for the bridge, including the change in the character of the bridge to be built from a two 200 foot spans riveted bridge resting on three concrete piers to a two 220 foot spans pin connected bridge, resting on one concrete pier and two shore piers; and a material change in the location of the center concrete pier in the river; and a change in the contract itself providing for a complete set of new plans and specifications for the bridge; and for additional consideration in the sum of \$3,487.00.

The Bond Company insists that it cannot be held under the terms of its bond for the performance of the contract referred to in the bond when the County and the Bridge Company, without its consent, substituted another contract with complete plans and specifications for a different kind of bridge than the one called for under the contract referred to in the bond.

The general rules applicable to the liability of a surety are well understood. The County and

the Bridge Company, without the consent of the Bond Company, could not change or increase its obligations to the County under the terms of the contract, for the performance of which the bond was given. The Surety Company contracted with the County for the performance of a particular contract. The failure of performance, if alleged, would necessarily be determined by the terms of the contract itself and the acts of performance thereunder. The County and the Bridge Company could not add to or take from the contract for the performance of which the bond was given, without the consent or approval of the Bond Company.

The claim is made here on behalf of the County that that consent was secured in advance because of a provision in the contract of December 18, 1911, as follows:

“Third: Should the County at any time, order alterations, deviations, additions or omissions, not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.” (Pg. 67.)

It is the contention of the County that because of this provision in the contract of December 18, 1911, the County and the Bridge Company had authority to make the contract of February 5, 1912, providing for complete new plans and specifications for the bridge, which would be substi-

tuted for the plans and specifications in the contract of December 18, 1911, and that because of this provision the County and the Bridge Company had authority to change the length of the spans, increasing the length of the bridge some 40 feet and consequently the weight upon the center pier; changing the location of the center pier to a point of greater danger in the river; and changing from three concrete piers to one concrete pier with two tubular shore piers for the bridge; and changing from a riveted steel span bridge to a pin connected bridge, all without the consent and approval of the Bond Company, and still hold the Bond Company liable to the County for a failure of performance under the contract of December 18, 1911. The purpose of the provision in the contract of December 18, 1911, and the intention of the parties to the contract, as gathered from the meaning of the terms employed, do not justify such an extreme position on the part of the County. The words "alterations, deviations, additions or omissions" can hardly be construed to mean a complete change in the kind and character of the bridge contracted for.

The terms will be given a reasonable construction, and their ordinary meaning. The court will assume that in the ordinary course of construction slight modifications and changes are made necessary or desirable, and that the parties reserved the right to make such changes, but the limit is reached before we reach a new contract with complete

plans and specifications.

The Supreme Court of the United States in the case of *United States vs. Freel*, 186 U. S. 309, had occasion to consider the provisions in a contract that provided for alterations and modifications, and to consider the extent that such alterations and modifications could be carried within the terms of a bond guaranteeing performance of such contract.

In the case referred to there was a change in the length of the dry dock, increasing its length from 600 to 670 feet, and there was a change in the location of the dry dock, moving it some 164 feet further inland. The contract expressly provided for alterations and modifications, such as should be found advantageous and necessary in the course of the construction of the dry dock. In this situation the Supreme Court of the United States held the Bond Company not liable to the Government for the construction of the dry dock under the terms of the contract where the change had been made in the length of the dock and in its location above indicated. The court syllabus said:

“The surety on a contractor’s bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties without his consent in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at

an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary.

“The objection that the surety should have set up as an affirmative defense by plea or answer and not by demurrer, the fact that such changes were made in the principal’s contract as would release the surety if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained.” And in the opinion at page 319 the court says:

“The declaration set out by attaching them as exhibits, the original and the two supplemental contracts, and it is alleged that the changes effected by the latter were made in pursuance of and in conformity with paragraph seven of the first contract. If upon the face of the agreement of August 17th, 1893, it appears that substantial changes were made in the location of the proposed structure, requiring additional excavation and connections at an increased expense, and extending the time limited by the contract for the comple-

tion of the dry dock, for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost, and time necessary for the completion of the work, operated to release the surety, if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the later had knowledge of the changes and consented thereto."

This court in *American Bond Company vs. United States*, 167 Federal 910, in referring to the *Freel* case, used the following language:

"The recent case of *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, is more in point, and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock—

'to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part.'

The seventh paragraph of the contract provided (substantially as in the contract before the court) that:

‘If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract.’

It was further provided:

‘That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract.’

It was further provided:

‘That no change herein provided for shall in any manner affect the validity of this contract.’

A supplemental contract in writing was entered into between the contractor and the chief of Yards and Docks, providing that the location of the dry dock should be—‘one sixty-four (164) feet further inland than laid down and staked out when the said contract

was entered into.' This supplemental contract provided full compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplement contract, but so slowly, negligently and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans and specifications, at a cost to the United States of the sum of \$370,000. The sum of \$72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damage alleged. The sureties interposed a demurrer, on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on

behalf of the United States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the contract was affirmed by the Supreme Court, which, after citing authorities relating to the liabilities of sureties, said:

‘The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. *United States v. Freel* (C. C.), 92 Fed. 299.’

It will be observed that, unlike the case before this court, the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but, like the

present case, the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change, so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable, and if a change is made in the contract without his consent his liability is at an end, even though it may appear that the change is for his benefit."

This court reached the same conclusion in the case of *Axman against United States*, 167 Fed. 922.

The case of *Axman v. United States* was again before this court and the judgment of the trial court affirmed in *United States v. Axman*, 193 Fed. 644.

In *United States Fidelity and G. Co. vs. United States*, 194 Fed. 611, this court again approved the

holding, and in the opinion page 616, says:

“The government, pursuant to the terms of the contract between it and Boggs, by reason of his default, took from him the possession of the premises as well as all of his material, machinery, and tools thereon for the purpose of having, at his expense, his contract fulfilled; and for that his surety bound itself, but not for the fulfillment of any essentially different contract. It is true that by its contract with Boggs, the government reserved to itself the right ‘to make changes, alterations or omissions from or additions to the work and materials herein provided for’; that is to say, changes in, additions to, or omissions from the work covered by the plans and specifications of the contract. This is plainly shown by the subsequent provisions of article 3 of the Bogg’s contract in which the reservation occurs. * * * * That reservation, in our opinion, affords no ground for holding the government entitled to make a substantially different contract with a third party at the expense of the former contractor and his surety. And such was the ruling of the Supreme Court in a similar case. In speaking of a like clause in the case of *United States vs. Freel*, 186 U. S. 309, the court said:

‘Coming, then, to the question of the effect on the responsibility of the surety of the sup-

plemental agreement of August 17th, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety and extinguished his liability. The seventh action had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense and gave an increased time of performance.' We do not understand the case just referred to (*United States v. Freel*) to be overruled by the very recent decision of the same court in the case of *United States vs. McMullen, et al* (Decided January 9th, 1912), 222 U. S. 460. * * * *
In the case of *American Bond Company vs. United States*, 167 Fed. 910, 93 C. C. A. 310, the question here involved was carefully considered by us, and being satisfied of the correctness of that decision, it is useless for us to pursue the subject further. Boggs' Surety is not, in our opinion, liable in this action for the reason that the government did not complete Boggs' contract, as it had the right to do, but instead chose to have the structures erected in a substantially different manner,

pursuant to the contract made by it with Owen.”

The Freel case and also American Bond Company vs. United States (Supra) are again cited with approval and upheld by this court in United States vs. Weisberger, et al, 206 Fed. 645.

(c) The contract of December 18th, 1911, provided that the Bridge Company should commence the construction of the bridge on or before August 1st, 1912, and complete the construction of the bridge on or before February 1st, 1913. This time limit was not extended in the contract of February 5th, under which additional compensation in the amount of \$3487.80 is provided for, presumably for additional construction, which increased the burdens of the Bridge Company within the time fixed by the contract of December 18. The time limit element in the contract of December 18th, 1911, was an essential feature of that contract and a material change in the structure to be built within that time, without the consent of the surety and without extending the time limit correspondingly with the increased structure would operate to release the surety. The fact that the county provided additional compensation in the amount of \$3487.00 to the contractor for the construction of a bridge under the contract of February 5th, 1912, conclusively establishes that the structure was substantially and materially different than the one called for under the contract of December 18th, 1911. The fact that no addi-

tional time was allowed for the presumed additional construction conclusively shows that the burdens of the contractor were substantially and materially increased for a consideration, but in which consideration the bond company in no way was to share. An increased burden placed upon the Bridge Company without the consent of the surety, without extending the time within which the increased work was to be done operated to materially change the obligations of the Bridge Company and operated to discharge the surety because the change was made without the surety's knowledge or consent.

In *O'Neal, et al, vs. Kelley*, 65 Ark. 550, 47 S. W. 409, in the opinion, the court says:

"This is an action upon a bond given by O'Neal to Kelley for the performance of a building contract. The contract for the full performance of which the bond was executed required that, for the sum of \$2,000 to be paid by Kelley, O'Neal should furnish materials and erect a brick building, the lower story of which should be 96 feet long and 14 feet high, and the upper story 75 feet long and 12 feet high. During the progress of the work, O'Neal contracted with Kelley that for the additional sum of \$25 paid him by Kelley, he would build the upper story 96 feet long, instead of 75 feet, as required by the original contract. The appellant sureties contend that this alteration of the contract discharged them

from further liability on the bond, and we are of the opinion that this contention must be sustained.

“The alteration of the contract shown in this case was material, and there is nothing to show that the sureties consented thereto. It required that O’Neal should erect a building of dimensions different from that required by the original contract, and for which he was to receive a different consideration. It called for the erection of a more expensive building, but no extension was made in the time within which the building was to be completed. As the sureties had undertaken that O’Neal should complete the building within a limited time, an alteration of the contract by which he was required to build a larger and more expensive building within the same time was, in our opinion, not only material, but directly against the interest of the sureties; and, as the same was made without their consent, it clearly operated to discharge them.”

3. The county and the Bridge Company without the consent of the surety changed the terms of the contract of December 18th, 1911, with respect to the payments to be made for the construction of the bridge in question, which action on the part of the county released the surety from any obligation for the faithful construction of the bridge under the terms of the contract. The county without the consent of the surety was not at liberty to

change material provisions of the contract and still insist upon the surety being held to the performance of the contract. A provision in the contract for alterations, deviations, additions or omissions, and for a determination of the fair and reasonable value to be added or deducted on account thereof, will not aid the county on the question of changing the time and manner of payment for the work to be done under the contract.

In *Blackburn v. Morel*, 13 Ga. App. 516, 79 S. E. 492, the court in the opinion says:

“The fact that the contract provided for change and alteration in the plans of the building has no bearing on the proposition to which we have referred, for there is a marked difference between a change as to the method and amount of the payments and a stipulation providing for changes in the structure to be erected.”

The situation here presents an extreme case. The contract of December 18th, 1911, provided that 25 per cent of the contract price should be paid upon the completion of the concrete piers, and 50 per cent upon the arrival of the steel for the bridge at the bridge site, and that the remaining 25 per cent should be paid upon the completion and acceptance of the bridge. (64.)

The county and the Bridge Company, under resolution dated July 26th, 1912, removed from the contract the above terms for payment, and substituted in place thereof provision for paying one-

half of the contract price in advance of the arrival of any of the materials or the doing of any of the work (88-89), and provided for and paid an additional \$12,500 before the concrete center pier was constructed, so that before any substantial work was done upon the bridge, more than \$25,000.00 had been paid the contractor. The courts have held that the provision in the contract to withhold payment or partial payment until the completion of the work, according to the contract, was an essential element of the contract, and a material inducement to the contractor to complete the work within the time and in the manner that would entitle him to be paid under his contract, and that a material change in the time or manner of payment, without the consent of the surety would thereby release the surety.

In *Backur vs. Archer, et al*, 109 Mich. 666, 67 N. W. 913, the court in the syllabus, says:

“Sureties on a contractor’s bond conditioned for the principal’s faithful performance of a building contract, which provides that the consideration is to be paid to the principal at times therein specified as the work progresses, are released from all liability on the bond, if the payments are made before they are due by the terms of the contract.”

And in the opinion the court says:

“In *Brant on Suretyship* (Section 397) it is said: ‘A surety for the completion of work to be performed by the principal where, by

the terms of the contract the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time, * * * * and it is no answer to say that it is to the advantage of the surety, or that he has sustained no prejudice.' *Warre v. Calvert*, 7 Adol. & E. 143; *Calvert v. Dock Co.*, 2 Keen 644. In the latter case the court said of a premature payment: 'What the company did was perhaps calculated to make it easier for Streather to complete the work if he acted with prudence and good faith, but it also took away that particular sort of pressure which the contract was intended to be applied to him.' The question was again fully discussed, and the doctrine of *Calvert v. Dock Co.* affirmed, in *Navigation Co. v. Holt*, 95 E. C. L. 550. The American authorities are in harmony with the foregoing English cases."

In *Board of Com'rs v. Braham, et al*, 57 Fed. 179, the court in the opinion, page 183, says:

"In the case at bar over \$10,000.00 were paid to the principals before, by the terms of the contract, they were entitled to receive anything. Such a gross departure from the terms of the contract, to the prejudice of the sureties, operates to release them from the bond in suit, unless the false and fraudulent conduct

of the principals in procuring the payment deprives the sureties of the right to take advantage of it. * * * By the terms of the contract the plaintiff, or its engineer, was required carefully to estimate the amount of work completed before making any payment. The performance of this duty was important, for the protection of the sureties. But, if the plaintiff had the right to rely on the representations of the contractors, that would have been a justification for the payment of no more than \$7480.00; so that the fraudulent representations, relied on, afford no excuse for the payment to the contractors of the sum of \$10,046.68. In no just sense can it be claimed that the plaintiff was induced to make the payment by the fraudulent representations of the contractors. It had no right to rely on such representations, and it was bound, either in person or by its engineer, to make the estimate of the work done for itself. If the plaintiff was misled, it was through its own fault, and the failure to perform what was required of it by the contract. In such case, it cannot shift the consequences of its own fault and want of care onto the sureties. *Manufacturing Co. V. Kimmel*, 87 Ind. 560."

In *First National Bank of Montgomery vs. Fidelity & Deposit Company of Maryland*, 145 Ala. 335, 40 So. 415, in the syllabus, the court says:

"Making payments before they are due un-

der the terms of a building contract will release a surety on the contractor's bond."

And further in the opinion the court says:

"It is a maxim of law that all parties, whether principal or surety, who reduce their contracts to writing, have a right to insist upon the terms of the contract as written; and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party, and is therefore entitled to the enforcement of the contract. When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts are made at the same time. The surety's bond recites that, whereas the building contract has been made. Then, in the absence of any explicit declaration to that effect, it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone, and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and

in this country, and the trend of the best authorities is so evident, that it seems useless to go over the arguments of the courts."

In *Evans vs. Graden*, 125 Mo. 72, 28 S. W. 439, in the opinion the court says:

"The defendant as a surety has a right to stand upon the agreement that Park would not pay Rider & Son during the progress of the work, more than 70 per cent of the value of the work done; and if Park, during the progress of the work paid Rider & Son more than 70 per cent of the value of the work done, without the consent of the sureties, he thereby discharged the defendant."

In *Cowdrey v. Hahn, et al*, 105 Wis. 455, in the opinion the court says:

"The entire contract price was paid by Cowdrey at the time when \$275 worth of work (which must be considered a substantial part thereof) was still unfinished, to the knowledge of Cowdrey. Not only was the \$275 not then due, but 15 per cent of the remainder of the contract price had not then become due, so that in all nearly \$800 was paid upon the contract long before it was due. The payment of this sum to the contractor before it was due must be regarded as amounting to a substantial modification of the contract by the principals without the consent of the sureties, and hence, upon familiar principles, relieves them from liability."

In *City Council of Greenville v. Ormand, et al*, 44 S. C. 116, the court in the opinion says:

“The disregard by the creditor of the provisions for the reservation of 10 per cent of the amount due on the engineer’s estimate was a material variation of, or departure from, the contract. The surety is bound, and only bound, ‘to the extent and in the manner and under the circumstances pointed out in his obligation,’ as stated by Mr. Justice Story in *Miller v. Stewart*, 9 Wheat. 703. This principle is recognized by all the authorities. Nor is it essential that the alteration of the contract should be injurious to the surety. The surety is bound by the contract which he makes, not by some contract which he did not make, even though the latter may be more favorable than the former. *Jackson v. Patrick*, 10 S. C. 197; *Gardner v. Gardner*, 23 S. C. 592. The contract made by the sureties expressly provided for the 10 per cent reserve. It is a mistake to suppose that this provision was inserted for the benefit of the city of Greenville alone, and that the city might waive it. It was designed to secure the satisfactory completion of the work according to the specifications of the contract, for which the sureties were liable, and was for their benefit as well as for the benefit of the city. The principals dealt with each other as if there was nothing whatever in the agreement in refer-

ence to the 10 per cent reserve, in effect striking that provision from the contract. This the principals could do, so far as they were concerned, but not so far as the sureties are concerned. The good motive which actuated the city council in disregarding this provision, viz., to enable the contractor to continue the work, cannot help the city in this contention, since it failed to do what was essential to bind the sureties—procure their consent. It may be that the payment to the contractor in full without regard to the stipulated reserve kept the work going to completion, and in this way was beneficial to the sureties; but, as shown above, the surety's liability on a contract materially altered by the principal is not to be determined by ascertaining whether he was injured or benefited by the alteration, but by the fact of alteration. It is quite easy to understand why the sureties in this case might not have signed the contract except for the provision as to the 10 per cent reserve. If by reason of the death or insolvency of the contractor the work should stop, and it should become the duty of the sureties to carry on the work, or indemnify the city for damages, the reserve might protect the sureties against final loss. Such reserve, too, would be very potent in holding the contractor to his contract."

In *Glenn County vs. Jones, et al*, 146 *Cali.* 518, 80 *Pac.* 695, in the opinion, the court says.

“In our opinion, the obligation of the principal was altered in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract, and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guarantying the construction of a building, to be paid for when completed and accepted, is quite different from the risk of guarantying its construction if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract while the other he would only pay out the money already received in performing it. In this case the sure-

ties agreed and guaranteed that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so. They did not agree that, if paid in advance, he would place such materials on the site. By this payment, the hope of reward for further performance was lost, and the temptation to act dishonestly was increased."

In *Fidelity & Deposit Co. vs. Agnew*, 152 Fed., 955,

"The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect, or engineer, whether a percentage is to be retained therefrom, until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as hold-

ing out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law. *Stream Navigation Co. v. Bolt*, 6 Com. Bench N. S. 550; *Calvert v. London Dock Co.*, 2 Keen 639; *Prairie State Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Shelton v. American Surety Co. (C. C.)*, 127 Fed. 736, affirmed 131 Fed. 210, 66 C. C. A. 94; *Welch v. Hubschmitt*, 61 N. J. Law, 57, 38 Atl. 824; *Village of Chester v. Leonard*, 37 Atl. 397, 68 Conn. 495; *Fitzpatrick v. McAndrews*, 12 Pa. Co. Ct. Rep. 353. This is too well established to be controverted, and the only question is how far it applies here."

In *Justice v. Empire State Surety Co.*, 209 Fed. 105, in the opinion, on page 107, the court refers to the case of *Fidelity and Deposit Company v. Agnew*, 152 Fed. 955, being a decision of the Circuit Court of Appeals of that Circuit, and with reference to the holding of the court in the *Agnew* case, to the effect that the withholding of payment until the work was done as required by the contract operating as an incentive to the doing of the work as required by the contract, and further in the opinion at page 108 says:

"After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of strictissimi juris was extended as between the sure-

ty and the obligee in the bond to the extent of requiring proof of actual injury in the case of breach of the terms of the bond by anticipation of payments by the obligee to the contractor. In such case, for the reasons stated in *Prairie State Bank v. United States and Fidelity Co. v. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance from the terms of the contract."

This case was reviewed by the Circuit Court of Appeals, 3rd Circuit, and found reported in Vol. 218 Fed. 802, where the judgment is affirmed on appeal, and wherein the court on appeal in the opinion says:

"Moreover the advancements are so large and substantial that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety, if such showing should be deemed important."

In *National Surety Company vs. Long* (8th Circuit), 125 Fed. 887, the surety was released because of a departure under the terms of the contract without the surety's consent having been obtained. The court in the opinion says (p. 892):

"The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenant of the defendant. He

who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform.”

In *Simonson v. Thori*, 36 Minn. 439, 31 N. W. 861, the court in the opinion at page 862 says:

“In anticipating the installments, and otherwise disregarding the conditions of the contract they were practically so modified that it was not the contract to the performance of which the plaintiffs had bound themselves as surety. In such cases the sureties may be deprived of the inducements which the principals would have to perform in due time as the contract required.”

4. The evidence fails to show that the proximate cause of the failure of the bridge was the use of the particular piling in question, and the failure of the bridge company to drive such piling as directed in the specifications of December 18, 1911.

(a) In order to fix a liability upon the bond company for the failure of the bridge, it is essential that the plaintiff show that the bridge company did not construct the bridge according to the plans and specifications therefor, and that such failure was the proximate cause of the failure of the bridge. In other words, if the bridge would have fallen, notwithstanding piling were used strictly in accordance with the specifications made part of the contract of December 18th, 1911, then the proximate cause of the failure of the bridge would

not be the kind of piling used, or the manner in which they were driven. The court in discussing the question at page 123 of the record, in its opinion, says:

“The failure to drive the piles to refusal is a sufficient and reasonable cause for the destruction of the bridge. It is clear the undermining was so great that these piles could not resist it. That it might also have been so great that these piles driven to whatever unknown depth would have been refusal, could not have resisted it, is mere conjecture and not permissible.”

If it was a part of the plaintiff's case to show that the proximate cause of the failure of the bridge was the failure to use the kind of piling in the manner specified in the contract of December 18th, 1911, then that burden was not met by the plaintiff. For, as the court says in its opinion, it was mere conjecture as to whether the bridge would have fallen anyway if the required piling had been used in the required manner.

(b) If the Bridge Company used piling called for in the specifications in the contract of December 18th, 1911, and had complied with those specifications in the driving of the piling and the bridge had failed because of the use of the piling in the foundation of the bridge, the Bond Company would not be liable to the county for the failure of the bridge. The obligations of the bond were that the bridge would be constructed in accordance

with the plans and specifications, which were a part of the contract for the performance of which the bond was given. The bond was not conditioned that the plans and specifications for the bridge were sufficient.

If the county directed the use of 22 foot piling 8x8 inches square in place of piling 12 inches at the larger end and 9 inches at the smaller end, the Bridge Company by the terms of the contract would be required to use such piling and such piling would be within the contract and plans and specifications. The contract by its terms provides that the county shall determine the length of the piling. The county through its county engineer and commissioners were present when the piling were being used, so that the court must presume that the county directed the use of the 22 foot piling, 8x8 inches square. The use of such piling by direction of the county would result in a modification of the specifications attached to the contract of December 18th.

The court in this case does not know what size or kind of piling were required to be used under the contract for which the bond was given, because the terms of that contract are not shown in this record or in the case, and if used in accordance with the modified plans and specifications in that respect the failure of the piling to sustain the bridge would not fix a liability upon the bond any more than a failure of the piling as specified in the original plans and specifications would have fixed

a liability upon the Bond Company. The fact is conclusively shown that the piling used would not have withstood the blow of a 2000 pound hammer falling 20 feet, which would excuse the Bridge Company from attempting to drive the piling with that kind of a hammer falling that distance. The power reserved in the county to direct the kind of piling to be used and the length of the piling would control the provisions with respect to the driving of the piling, as the greater would include the less. If the piling 22 feet long, 8x8 inches square would not withstand the blow of a hammer weighing 2000 pounds, falling 20 feet, within 400 per cent, and the county directed the use of that length and kind of piling, that fact would result in a modification of the requirements in the specifications for the driving of the piling. The presence of the county through its engineer and commissioners at the pier while the foundation was being put in and the participation of the county in the construction of the foundation of the pier conclusively establishes the consent of the county, and by reason of the reserved power in the contract, conclusively presumes the direction of the county for the use of the particular piling.

If the piling used, as the record conclusively shows, would not have withstood the blow of a 2000 pound hammer, falling 20 feet with 400 per cent, then as a mere matter of mathematical calculation, we know that piling 9 inches in diameter at the smaller end and 12 inches at the larger end

would not withstand such a blow, because the quantity of material in the 9x12 inch piling would not exceed that in the 8x8 piling by 400 per cent, so the record shows that the piling specified in the contract of December 18th would not have withstood the blow of the hammer **if 22 feet long**. The length of the piling used is almost controlling in the matter of the weight of the hammer and the distance it is to fall in driving the piling.

The specifications in express terms direct that the county shall determine the length of the piling, and by determining that 22 foot piling should be used, the county modified the requirement with respect to the driving of those piling, because of the impossibility of driving them as specified in the contract of December 18th, 1911, which did not specify the length. The county had the power reserved in the contract to specify the length of the piling which at all times controlled the specifications as to the weight of the hammer and the distance it should fall.

(c) The record shows that the use of concrete in the base of the pier stopped while they were still in sand and gravel, so that the concrete was not carried down to a solid foundation. The use of piling was much cheaper, and the county reserved the right to determine which should be used. The record shows that if the matter had been left to the Bridge Company, piling would not have been used at all, but the concrete would have been carried on down. (p. 104.) No one ques-

tions that if the concrete had been carried down to a solid foundation below the sand and gravel that the water would not have cut under the concrete and the pier would have stood. It was because the water cut out the sand and gravel under the concrete in the foundation of the pier and exposed the piling, which were insufficient to carry the weight of the pier and bridge, that the bridge fell. This of course would have been true because of the weight of the pier and bridge, if the piling 12 inches at the top by 9 inches at the bottom had been used. It would not have been true if the concrete had been carried down below the sand and gravel to solid foundation. The county determined the extent to which the concrete should be carried down in the base of the pier. In this situation the county fails to show that the proximate cause of the failure of the bridge was the failure of the Bridge Company to drive a certain kind of piling to refusal.

The bond attached to the complaint recites that it is given for the performance of a "new contract" for the construction of the bridge in question attached to which new contract are modified plans and specifications. The terms of that contract and the requirements of those specifications were not shown, so there is a total failure to fix liability upon the bond company because of the use of piling in the base of the pier as alleged in the complaint. There is no connecting link between the bond sued on and the contracts made a part of the

complaint and there is no connecting link between the piling used and the requirements of the specification in the contract on account of which the bond was given. In this situation the plaintiff must fail in sustaining a recovery.

Whether the bridge would have failed or not if piling had been used as specified in the contract of December 18th, 1911, is a mere matter of conjecture, but in order to determine the proximate cause of the failure that matter would necessarily have to be shown.

We respectfully submit that the judgment should be reversed and the action dismissed.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL SURETY COMPANY,
Plaintiff in Error,
vs.
COUNTY OF LINCOLN,
Defendant in Error.

REPLY BRIEF.

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Filed

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Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

NATIONAL SURETY COMPANY,

Plaintiff in Error,

vs.

COUNTY OF LINCOLN,

Defendant in Error.

REPLY BRIEF.

I.

It is argued for the County that as the surety company became surety for a consideration, the principles of law controlling the liability of sureties without compensation do not apply. This argument is fully answered by the statute law of Montana authorizing foreign surety companies to do business in that state. Section I of the Act of March 10, 1909 (Session Laws of 1909, p. 209), provides that such companies may be accepted as surety upon a bond of any person or corporation required by the laws of the state to execute a bond;

“ * * it being the intention of this chapter to enable corporations created for that purpose to become the surety on bonds required by law, *subject to all the rights and liabilities of private persons.*”

Section III of the same Act provides that:

“Such company may be released from its liability on a bond on the same terms and conditions as are by law prescribed for the release of individual sureties.”

The provisions of the statute of Montana relating to the exoneration of sureties are as follows:

Section 5686 of the Revised Codes of Montana provides:

“A surety is exonerated:

1. In like manner with a guarantor.
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
3. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety, which it is his duty to do.”

Section 5673 provides:

“A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal *is altered in any respect*, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired or suspended.”

In the case of *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683, the Court said:

“When a surety has shown that the contract to which he became a surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other

party to show that the surety has consented to the new contract.”

In the case of *Barrett-Hicks Co. v. Glas*, 99 Pac. (Cal.) 856, the Court said:

“It is well-settled law that a surety may stand upon the strict letter of his bond, and that where a principal has, without the consent of the surety, materially violated the terms of an agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has guaranteed the faithful performance of building contracts.”

In the late case of *Dunne Inv. Co. v. Surety Co. et al.*, 150 Pac. 411, the Supreme Court of California said:

“A surety is exonerated in like manner with a guarantor, for section 2840 of the Civil Code so expressly provides, and a guarantor is exonerated, except in so far as he may be indemnified by the principal, ‘if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal, in respect thereto, in any way impaired or suspended.’ Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or suspended, it is thoroughly settled by our de-

cisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby.”

The statute of California, with reference to the liability of sureties, is the same as the statute of Montana on the subject, and the statute of Montana was undoubtedly taken from California.

It is, however, wholly immaterial whether the obligation of the surety is measured by the statutory law of Montana or by the general law. This Court applied the rule of strict construction to the contract of a surety in the case of the *American Bonding Co. v. U. S.*, 169 Fed. 910.

In the case of *Reese v. United States*, 9 Wall. 13, the Court, in discussing the liability of sureties, said:

“Any change in the contract, on which they are sureties, made by the principal parties, to wit, without their assent discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking.”

See, also:

Cross v. Allen, 141 U. S. 537;

Zeigler v. Callahan, 131 Fed. 205;

U. S. v. American Bonding Co., 89 Fed. 925;
Orleans & J. Ry. Co. v. Construction Co., 37
So. 10;

National Surety Co. v. Long, 125 Fed. 887.

II.

It is contended for defendant in error that the trial Court having sustained an objection to an offer of proof that the surety was indemnified by the bridge company, the presumption obtains that it was so indemnified, and consequently it cannot defend as a surety, but must be regarded as a principal.

In the first place, there is no allegation in the complaint that the surety company was indemnified, and, in the second place, the action is squarely based on the contract of the surety company evidenced by the bond made a part of the complaint. But, however this may be, the offer of proof was rejected, and the defendant in error is not in a position to take any advantage of rejection of the offer.

The authorities cited on page 31 of the brief of defendant in error apply a principle of the common law which has been embodied in section 5694 of the Revised Codes of Montana, reading as follows:

“A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.”

Even in such case, the taking of security by the surety for his indemnification, in case of loss, would

not prevent his discharge, if it has been surrendered, or the security has become worthless.

Rittenhouse v. Kemp, 37 Ind. 258;

Fay v. Tower (Wis.), 16 N. W. 558.

There is no pretense that any security by way of indemnity was given in this case. The action is upon the surety company's bond, and it "cannot be held beyond the express terms of its contract."

Revised Codes, sec. 5682.

III.

It is claimed for the county that the change in the location of the center pier and the placing of the floor of the bridge three feet lower than the elevation designated on the plans were authorized by the provisions of the contract, reading as follows:

"Should the county, at any time, order alterations, deviations, additions or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price as the case may, by a fair and reasonable valuation."

As we have shown in the briefs heretofore filed, the changes in the location of the center pier and in the elevation of the floor of the bridge were not authorized by the provision of the contract just quoted. The fact that such changes were not authorized by the contract, or within the contemplation of the parties, is conclusively established by a reference to the

provisions of the Act of Congress relating to the construction of bridges over navigable streams.

Section 1 of said Act, approved March 23, 1906, provides as follows:

“That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.”

Section 5 of said Act provides as follows:

“That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in ac-

cordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any person who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction therefor shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the Circuit Court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary of War;

and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the Circuit Court of the United States in any district which any portion of said obstruction or bridge touches.”

(34 St. at L. 84.)

The location of the center pier and the elevation of the floor of the bridge were matters of vital importance, as they necessarily had to do with the navigability of the stream. The location of the center pier and the elevation of the floor of the bridge were designated on the plans which the contract between the bridge company and the county required should be approved in the manner provided by the Act of Congress before the contract should take effect. As there was no authority to deviate from the plans without first submitting the modified plans to and receiving the approval of the Chief of Engineers and of the Secretary of War, it follows, of course, that the contract did not authorize the County to do what could not have been lawfully done.

IV.

By an Act of Congress, approved March 4, 1912, (37 St. at L. 71), it was provided:

“That the consent of Congress is hereby granted to the board of county commissioners of Lincoln County, Montana, to construct, maintain and operate three bridges, and approaches thereto across the Kootenai River at points suitable to the interest of navigation, located as

follows, all in Lincoln County, Montana: Near the town of Rexford, near the town of Libby, near the town of Troy. Provided, that the aforesaid bridges shall be constructed, maintained and operated in accordance with the provisions of the act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

Congress has, in the exercise of its right to regulate commerce, assumed jurisdiction over the Kootenai River and the presumption obtains that the Act of Congress is constitutional. In the case of *United States v. Harris*, 106 U. S. 629, Mr. Justice Woods, in delivering the opinion of the court, said:

"Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no Act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated."

In the case of *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, the Court said:

"In examining an Act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such Act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed

by this Court from the foundation of the government.”

There is no presumption that the Act of Congress was complied with.

In the case of *Texarkana & Ft. S. Ry. Co. v. Parsons*, 74 Fed. 408, which was an action to recover damages caused by the erection of a bridge over a navigable river, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Circuit Judge Caldwell, said:

“Congress has the power to determine the location, plan, and mode of construction of such bridges; and a bridge constructed over a navigable river in accordance with the requirements of the Act of Congress is a lawful structure, however much it may interfere with the public right of navigation.” (Citing many cases.)

The Court further said:

“It is equally well settled by the authorities we have cited that those who seek to justify the erection or maintenance of a bridge across a navigable river, which obstructs its navigation, upon the ground that Congress authorized its erection and maintenance, must show that it was constructed and is maintained in accordance with the requirements of the Act of Congress. The defendant does not seem to have offered any evidence to prove a compliance with any of the numerous requirements of the Act of Congress under authority of which it is claimed the bridge had not been constructed in accordance with the

explicit requirements of the Act of Congress, in a material respect. The Act requires that the openings on each side of the pivot pier shall not be less than 130 feet in the clear, unless otherwise expressly directed by the Secretary of War; and it was not claimed that any such direction was given, and it was conceded that they were only 125 feet in the clear. The fifth section of the Act declares that until the 'plan and location of the bridge are approved by the Secretary of War, the bridge shall not be built.' There was not only no suggestion that the Secretary of War had approved the narrowing of the openings on each side of the pivot pier, but it does not appear that he approved the location of the bridge, or the plans, or any plans whatever, relating to its construction. Indeed, for anything contained in the record before us, this bridge was constructed in entire violation of the law. However this may be, the bridge varies in its construction, in a material respect, from the requirements of the Act of Congress, and is therefore an unauthorized and unlawful structure. The variation is material and substantial and robs the structure of the protection of the statute. The Act of Congress is mandatory, that 'the bridge shall not be built' until certain things have been done. The complaint avers that these things were not done, and there is no evidence in the record tending to show that they were done, and in the absence of proof there is no presumption that they were done. Upon the state of the record, therefore,

the Court would have been justified in telling the jury that the bridge was an illegal structure, and that the defendant was liable to the plaintiff for any damages resulting therefrom."

See, also :

Pennsylvania Ry. Co. v. Baltimore etc. Co., 37 Fed. 129.

In the opinion in the last case cited, Judge Wallace, said :

"The demurrer thus raises the question of the burden of proof in a case where the navigation of public waters has been obstructed under circumstances that constitute a nuisance, unless those concerned are authorized by competent authority to maintain the obstruction in the manner and to the extent in which it exists. I have no hesitation in deciding that those who obstruct the use of a public highway, whether on land or water, must justify the act by producing their authority, and proving that they have exercised it in essential conformity to its terms."

Whatever may be the fact with reference to the approval by the Secretary of War and Chief of Engineers of the plans and specifications originally adopted for the construction of the bridge, proof was made, which is not contradicted, that the center pier of the bridge was constructed a distance of sixteen feet in a direction across the stream from where it was located on the plans, and the floor of the bridge was lowered a distance of two feet and nine inches from the elevation as shown on the plans. These

modifications were made by verbal agreement and without changing the original plan or making any supplemental plan covering the modification. (Record, pp. 105-108.) It follows, of course, that the modifications thus made could not have been approved as required by the Act of Congress. The Act of Congress expressly declares that: "It shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

We therefore submit that the bridge as constructed was a public nuisance, and that the construction of the bridge was in violation of law. Under the circumstances there could be no recovery against the bridge company, for the violation of the contract as an illegal contract cannot be made the basis of a cause of action.

Hart v. City Theaters Co., 109 N. E. 497;
 Bradfeldt v. Cooke, 50 Am. St. Rep. 701;
 Spurgeon v. McElwain, 27 Am. Dec. 266;
 2 Elliott on Contracts, sec. 3704, p. 887;
 2 Elliott on Contracts, sec. 664, p. 22;
 Miller v. Ammon, 145 U. S. 421.

This Court will, of its own motion take notice of the illegality of the contract, although the validity of the contract is not challenged by the pleadings, and it is the duty of the Court to refuse to grant relief for the alleged violation of the contract.

Oscanyan v. W. R. Arams Co., 103 U. S. 261;
 Hall v. Coppell, 7 Wall. 542;
 Cansler v. Penland, 48 L. R. A. 441;
 Heffron v. Daly, 95 N. W. 714;
 Claflin v. U. S. etc. Co., 52 Am. St. Rep. 528;
 15 Am. & Eng. Ency of Law, p. 1014.

In the opinion in the first case cited the Court said:

“Here the action is upon a contract which, according to the view of the Judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the Court itself was bound to raise in the interest of the due administration of justice. The Court will not listen to claims founded upon services rendered in violation of common decency, public morality or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, the culprit should sue the instigator of the crime for the promised reward if we may suppose that audacity could go so far, the Court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading nor, indeed, could it be by the defendant’s waiver if we may

suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality.”

V.

It is argued for the defendant in error that the change in the location of the center pier to a point nearer the middle of the stream than the place designated for its construction on the plans was not made by direction of the county, but that the responsibility for such change rests on the bridge company.

It is contended for defendant in error that Commissioner Geary was without authority to order the change made, as the County Commissioners can only act authoritatively when assembled as a board. The claim that the responsibility for the change rests with the bridge company, for the reason that Mr. Geary was without authority to make any modification of the contract, completely overlooks the fact that the bridge as constructed was accepted by the county and the full contract price therefor paid. The acceptance of the bridge, and the payment of the contract price, amounted to a ratification of the action of Commissioner Geary in ordering a change in the location of the center pier. There is no pretense but that the change in the location of the center pier was obvious to anyone or that the acceptance of the bridge was made by the county without knowledge of the change.

It is, however, wholly immaterial whether the responsibility for the change in the location of the center pier and the change in the elevation of the floor of the bridge to three feet lower than called for by the plans was with the county or the bridge company, or both; for in either event the county accepted and paid for a bridge which was not constructed according to the contract to which the obligation of the surety company applied. When the county accepted the bridge which differed so materially from the bridge which the bridge company contracted to construct, the acceptance was equivalent to the making of a new contract, the performance of which was not guaranteed by the surety company.

VI.

It is also argued for the defendant in error that the county had no control over the amount of concrete which should be used in the piers, nor over the matter of using piles. In answer to this argument we direct attention to the following provision of the contract:

“The bridge company promises and agrees to furnish and construct in place any additional concrete required in the said piers below water for fifteen dollars per cubic yard, and any additional concrete required in said piers above water for ten dollars per cubic yard. It is further agreed and understood that, should the county deduct any concrete from said piers, which is hereby made optional with said county, the bridge company will allow the county the

sum of thirteen dollars per cubic yard for all concrete so deducted below water and the sum of eight dollars per cubic yard for all concrete deducted above water. It is further agreed and understood that, should piling be required under any of the piers, the price to be paid for said piling shall be forty cents per lineal foot, and the length of such piling shall be specified and determined by the county or its representative."

This provision of the contract, when considered in connection with the provision of the specifications that "After excavation is made to the full depth, piles shall be driven inside if so ordered by the engineer," shows conclusively that the engineer referred to was an engineer who should be provided by and represent the county.

It is argued for defendant in error that the county was without authority to employ an inspector or engineer to supervise the work, and therefore it cannot be charged with any dereliction of duty in failing to take any precaution to see that the contract was complied with.

Mr. Pratt, one of the commissioners, testified that "The board of county commissioners did not have any engineer, or other person supervising the construction of the bridge in question." (Record, p. 95.)

By the provisions of sections 1387 and 1389 of the Revised Codes, the board was required to cause an inspection to be made of highways and bridges, and "the work done thereon before payment therefor,"

and file "written report of such inspection." Section 5 of the Act of March 11, 1909 (Session Laws of 1909, p. 225), an Act for the permanent improvement of main highways, which includes the construction of bridges (section 13, p. 230, Laws 1909), the county surveyor is given "general charge and supervision of the work, and shall report to the board of county commissioners of this (his) county from time to time the progress of the work and such facts in relation thereto as may be required."

The construction contract and the specifications expressly providing for inspection and supervision of the work by the board of county commissioners, or their authorized representative; the law in force making it the duty of the board to see to it that such inspection was made; the contract also providing that the material and work should be acceptable to the board, or its representative, and that payment should not be made until the completion of the piers and the acceptance of the bridge, the surety had the right to assume that these conditions would be complied with, and the failure on the part of the board of county commissioners to comply with them, either in whole or in part, and accepting the bridge without having taken any precautions to insure the performance of the contract according to its terms and conditions, released the surety company from its obligation.

In *City Street Improvement Co. v. Marysville (Cal.)*, 101 Pac. 308, 23 L. R. A. (N. S.) 317, the Court said:

“In *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136, where the contract provided that a building should be constructed according to certain plans and specifications, to the satisfaction of the architect, ‘who shall inspect all material and work as the building is constructed,’ and who was invested with power to reject any material or work not deemed by him to be in compliance with the contract, it was held that the manifest intent was that unsatisfactory material or construction should be promptly rejected; that the architect should not, by silence, allow unsatisfactory construction to proceed to a point where the removal from the building would be attended with serious loss to the builder, and that a failure to reject seasonably operated as a waiver. * * *

In *Ashland Lime, Salt & Cement Co. v. Shores*, *supra*, this rule was declared to state a reasonable and just doctrine in cases of this nature. The Court, through Marshall, J., said that where the owner stipulated for inspection and approval as the building is constructed, and for a representative of his own to compel compliance with the contract at every step, if such representative failed to perform his duty, the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory till too late to remedy defects therein without serious loss; that the owner should look

to his architects; that he should be and is bound the same as if he were upon the ground himself, charged with the duty of accepting or rejecting material or construction as soon as there is a reasonable opportunity for the inspection of it. It was said that this is but an application of the elementary principle that, where property is delivered by one person to another, as fulfilling an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with the contract within a reasonable time after a fair opportunity to inspect it, an acceptance will be inferred; and that any considerable delay in that regard must operate, by all equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection."

In *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County*, 62 Fed. 698, the Circuit Court of Appeals of the Fifth Circuit said:

"In the case as presented for our judgment, the plaintiff was a nonresident corporation, acting entirely through its agents and subcontractors, and the provision in the contract which placed it within the power of the defendant county to select its own commissioner to act as inspector during the building, if honestly carried out in accordance with its terms, would necessarily have been of the greatest assistance and protection to both of the contracting parties,

and would appear to be a wise and prudent precaution in the completion of such a work, the actual supervision of which must necessarily be delegated to the representatives of each party, and could not be scrutinized by the principals of either. By it every opportunity in reason was given for the defendant to secure good materials and work, and the plaintiff would at the same time be protected from the faults and negligence of its own servants, by being immediately informed of, and enabled to correct them, and also from any complaints that might be subsequently made, too late to determine their truth or falsity. The action of such an arbiter or supervisor in the absence of any complaint made at the time and in the manner provided by the contract is *prima facie* evidence of compliance with the contract, and should be conclusive, except upon clear and distinct proof of fraud. Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035; Kihlberg v. U. S., 97 U. S. 398; Sweeney v. U. S., 109 U. S. 618, 3 Sup. Ct. 344; Railroad Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290; Ogden v. U. S., 60 Fed. 725; Railway Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343."

To the same effect:

Moore v. Kerr (Cal.), 4 Pac. 542;

Smith v. Farmers' Trust Co. (Iowa), 66 N. W. 84;

State v. Coleman (Wash.), 127 Pac. 568, p. 571;

Wait on Eng. & Arch. Jr., sec. 467, p. 404;
 Wyckoff v. Meyers, 44 N. Y. 143;
 District of Columbia v. Gallagher, 124 U. S.
 505;
 Chicago etc. Ry. Co. v. Price, 138 U. S. 185;
 Guild v. Andrews (C. C. A.), 137 Fed. 369;
 Continental etc. Bank v. Corey Bros. Const.
 Co. (C. C. A., 9th Ct.), 208 Fed., on p. 976.

If the county had been represented by a competent engineer, as the contract contemplated, the bridge would not have collapsed. The engineer, if competent, would have directed the placing of the base of the pier at the proper depth in the bed of the stream. The provisions of the contract, contemplating the supervision and inspection of the work by the engineer of the county, were of much consequence to the surety. It is self-evident that the probability of a contractor who has engaged to construct a bridge or other structure, failing to comply with his contract, is much less where the other party to the contract has the right to supervise, direct and inspect than where the contractor is in no manner watched or directed. We therefore submit that, while the bridge company could waive the provision of the contract requiring supervision and inspection by an engineer representing the county, such waiver, without the consent of the surety, exonerated the surety from all liability for any breach of the contract.

VII.

It is further argued for defendant in error that the change in the contract with reference to the time

of payment was authorized by the following provision contained in the contract:

“Third: Should the County, at any time, order alterations, deviations, additions, or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.”

The language of this provision clearly shows that it did not authorize the change in the terms of the contract with reference to the payment of the contract price. In the case of *Blackburn et al. v. Morel et al.*, 79 S. E. 492, it was contended that a similar provision in a contract considered in that case authorized a change in the terms of payment without the consent of the surety. The Court in the opinion said:

“The sureties not having consented to this change of the contract, were entitled to claim a discharge, regardless of how it affected them, and even if the change had inured to their benefit.

The fact that the contract provided for change and alteration in the plans of the building has no bearing on the proposition to which we have referred, for there is a marked difference between a change as to the method and amount of the payments and a stipulation providing for changes in the structure to be erected.”

VIII.

It is further argued for defendant in error that the change made in the contract cannot be taken advantage of because of the failure of the surety company to allege that the change had been made.

In order to establish a liability against the surety it was necessary for the plaintiff to allege and prove that the bridge was constructed under and pursuant to the contract for a violation of which the surety is sought to be charged. It was also necessary for the plaintiff to allege and prove compliance with the contract on its part, which necessarily involved the making of the payments according to the terms of the contract, for the performance of which the surety was bound. When, therefore, it appeared that the contract had been changed and that the payments were not made according to the original contract, the plaintiff's case failed.

People's Lumber Co. v. Gillard, 68 Pac. (Cal.)
576.

In the case just cited the Court in the opinion said:

"It is claimed that the suit cannot be maintained, because it is brought on a bond given to secure the performance of the original contract, and the evidence shows that the contract was altered after the bond was executed. The action is brought on the bond attached to the original contract, and the complaint alleges that the bond was given to secure the performance of this contract, and there is no allegation that it was ever altered in any particular. The bond refers to this contract, and no other."

The Court further said:

“The only question is whether plaintiff can recover on the complaint as it stands, if it be made to appear that the contract was materially changed after the bond was given. The cases cited by appellant are to the effect that, having declared on the original contract, it would have been nonsuited on proving that the work was done under a modification or different contract. There was some evidence that the contract was changed as to the dimensions of certain timbers. Plaintiff submitted evidence tending to show that the plans were substantially carried out, and the changes mentioned were in the interest of the contractors, and hence in the interest of defendants. But defendants pleaded other material changes, and offered to prove such changes. If in fact the contract was modified as defendants claimed, it would show that the complaint relies upon a different contract from that which was in fact followed in doing the work, and hence the action in its present form could not be maintained. There would have to be an amendment to the complaint to conform to the facts. It was so held in the cases cited on what seems to be abundant authority. The defendants had the right to show that the original contract referred to in the complaint was not the contract under which the work was done, and it is no answer to the rule of pleading that, even if the complaint had alleged the modification, the defendant would still have been liable under the

provisions of the contract above quoted. See *O'Connor v. Dingley*, 26 Cal. 11. In the present case there is no difficulty in stating the facts constituting the cause of action. Plaintiff could have alleged the execution of the contract, its terms, and subsequent modification or deviation in accordance with the permission given in the contract, the performance of the contract so far as it was performed, abandonment by the contractors, the subsequent completion of the building by the school district, the breach of the bond, and the damages thereby sustained. As was said in the case last cited: 'If there is any meaning in the rule that the evidence offered must correspond with the allegations, there can be no question that, according to the rules of the practice act requiring the facts to be stated, the contract should be set forth in the complaint, together with the necessary allegations of deviation, performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant was indebted for work and labor, etc.' The case in 61 Cal., *supra*, is in point, and was a suit on a bond, as is the present case, and the principle laid down above was there applied. In that case the bond was given to secure the faithful performance of one Lonsdale with plaintiff. It appeared at the trial that some changes had been made in the contract after the bond was given. The action was on the bond, and it was alleged that the breach arose because of Lonsdale's failure to keep the original contract.

The Court said: 'It necessarily follows that plaintiff cannot recover damages for nonperformance by Lonsdale of the conditions of the original agreement, upon which, and the non-performance by Lonsdale of the conditions of which, plaintiff alone counts in his complaint. Even if it should be admitted that the change in the contract between plaintiff and Lonsdale was one contemplated by the wording of the bond, plaintiff could not recover upon allegations of the terms of the original contract, and of non-performance of its conditions by Lonsdale. His complaint should have set forth the substituted or modified agreement.' "

See, also, *U. S. v. Freel*, 186 U. S. 309.

IX.

In answer to the contention in behalf of plaintiff in error that the complaint does not charge that the surety company guaranteed the performance of the contract as modified in February, 1912, it is said that the provision with reference to the driving of piles is the same in the original contract of December 18, 1911, as in the modified contract of February 5, 1912, in consequence of which it is immaterial that the complaint does not show that the obligation of the surety company applied to the contract as modified. Even though the two contracts in the particular mentioned are the same, the contracts differ materially in other respects as shown in our original brief, and the surety company cannot be held liable for the failure of the bridge company to perform a contract to which the obligation of the surety never applied.

It is further argued that the objection that the surety company never guaranteed the performance of the modified contract is made too late, for the reason that the complaint will be regarded as amended to conform to the proof. The difficulty with this argument is that there is no proof whatever that the surety company ever heard of the modification of the contract in February.

X.

It is further argued for defendant in error that it is now too late to present the objection that the plans and specifications for the bridge were never approved by the Secretary of War and the permission of the Secretary to construct the bridge obtained, which were made conditions precedent to the contract taking effect. By the amendment of the complaint made at the trial (Record, p. 61), the original contract dated the 18th of December, 1911, was made a part of the complaint as Exhibit "A." After this amendment an objection was made in behalf of plaintiff in error to the introduction of any evidence upon the ground that the complaint as amended does not state a cause of action. This objection clearly presented the question whether it was necessary to allege that the plans and specifications had been approved by the Secretary of War and permission to construct the bridge obtained. But, however this may be, the contract of December 18, 1911, was introduced in evidence and no proof was made of compliance with the condition requiring the approval of the plans and specifications by the Secretary of War.

It is elementary law that the objection that the complaint in a case does not state a cause of action may be presented for the first time in the appellate court.

Respectfully submitted,

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United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

NATIONAL SURETY COMPANY,
a corporation,

Plaintiff in Error.

vs

COUNTY OF LINCOLN,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District
Court of the District of Montana

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Plaintiff in Error has filed three briefs—One on or about Oct. 1st—One on Oct. 18th and one on Oct. 21st. Hearing was had on Oct. 19th. The brief filed Oct. 18th is labeled “Reply Brief of Plaintiff in Error” but it was stipulated with the approval of the Court that the brief is in fact a Supplemental brief and would be treated as such.

In this brief we shall therefore refer to the brief of Oct. 18th as the “Supplemental Brief of the Plaintiff in Error.”

We will take up first, the points urged in the reply brief of Oct. 21st and endeavor to discuss them in the order which plaintiff in error has arranged them, maintaining so far as possible the same numbering.

I

It is contended that the provisions of the Montana Code authorizing surety companies to do business in Montana have fixed the liabilities and privileges of such companies unalterably, so far as the Courts are concerned and that the distinction which many of the Courts have made between voluntary and compensated sureties cannot be applied in Montana, by reason of these provisions.

We cannot concede the soundness of this contention. In the first place, the distinction which the courts have made by which the rule of strict construction has been relaxed is not as between “Corporate” sureties and “individual” sureties but between “compensated” or “paid” sureties and voluntary sureties. While it is true, the cases, (so far as we have examined them) in which the distinction is made are cases in which one surety company or another were involved, the rule would be the

same were the defendant an individual surety, soliciting business in that line and signing bonds for a consideration, in other words—A professional bondsman. A distinction based on the mere fact that the surety in a given instance is a corporation would be intolerable and indefensible.

There is nothing then in Section I of the Act of March 10th quoted in defendant's reply to prevent the application of the rule that compensated sureties cannot invoke the rules of strict construction and that in such cases actual prejudice must be shown before the surety can claim a discharge by reason of changes in the contract.

But Counsel quote from Section III of the act as follows:

“Such company may be released from its liability on a bond on the same terms and conditions as are by law prescribed for the release of individual sureties.”

Here again Counsel fail to distinguish between the terms “release” and the terms “discharge” and “exoneration” of sureties.

What did the legislature mean by the words “such company may be *released* * * * on the same terms and conditions as are *by law prescribed* for the release of individual sureties?”

The answer to these questions is found in Sections 403-404-405-406- and 412 of the Montana Codes.

These provisions are as follows:

“403. (1075). Release of Sureties.—Any Surety on the official bonds of a city, town, township, county or state officer, may be relieved from liability

thereon afterwards accruing, by complying with the provisions of the three sections following.”

“404. (1076). Same.—Such surety must file with the judge, court, board, officer, or other person authorized by law to approve such official bond, a statement in writing setting forth the desire of the surety to be relieved from all liabilities thereon afterwards arising, and the reason therefor; which statement must be subscribed and verified by the affidavit of the party filing the same.

“506. (1078). Office declared vacant for want of official bond.—In ten days after the service of such notice, the judge, court, board, officer, or other person with whom the same is filed must make an order declaring such office vacant, and releasing such surety from all liability thereafter to arise on such official bond, and such office thereafter is in law vacant, and must be immediately filled by election or appointment, as provided for by law as in other cases of vacancy of such office, unless such officer has before that time given good and ample surety for the discharge of all of his official duties as required originally.”

“412. To what bonds applicable.—The provisions of this Article as the same shall be in force after amendment by this Act, shall apply to all official bonds, and to bonds and undertakings of receivers, executors, administrators, and guardians, and to all bonds and undertakings required by law to be given and approved by any court, judge, board, person or body, and, except as to requirements of

such approval the provisions shall apply to all bonds given or required by law to be given in attachment proceedings, criminal actions or proceedings, bail bonds, appeal bonds, and all bonds given in any legal proceedings or action in any court of this state.

(Act approved March 7th, 1899.) (6th Sess. 81-82)."

The balance of paragraph "I" pp. 2-5 of defendant's reply brief is devoted to a discussion of the effect of alteration of or changes in the terms of the contract.

We insist that there were no changes in the *contract* and that the departure from the terms of the contract was a voluntary act on the part of the Coast Bridge Company for which we were in no wise responsible.

II

Under subdivision II counsel assumes that there is no proof in the record that the surety company has been indemnified and that the court cannot assume the fact merely by reason of our offer by proof.

Counsel misunderstands our position.

On page 116 of the record Mr. Magee, Asst. General Solicitor for the defendant surety company writes the firm of Logan & Child:

"This company was merely surety on the bond in question, and, of course, must be governed by the instructions and directions of its *indemnitors* in all matters arising under it."

It is our contention that when the Assistant General Solicitor of the Insurance Company used the word "*indemnitors*," the word was used advisedly and according to its legal meaning. The legal meaning of the word is defined by Section 5648 of the Montana Code quoted at

length on page 29 of our brief in chief.

The proof then is that the Company was indemnified and in consequence is stripped of all defenses peculiar to suretyship and is before their court merely as a nominal defendant entitled to the benefit of only such defenses as would be available to the principal

Mr. Magee as the Assistant General Solicitor of the Company also advises us that the surety company "must be governed by the instructions and directions of its indemnitors."

In other words the company confesses that it is only a nominal party and that it has no control over its own actions with respect to matters arising in connection with the bond in question. Again it must be assumed that Mr. Magee in using the language quoted, did so advisedly and in view of the legal position, of the company as controlled by the laws relating to indemnity.

On page 30 of our brief in chief we quote in full subdivision 6 of Section 5654 of the Montana Codes.

This subdivision provides that if the person indemnifying is not allowed to control the defense, judgment against the surety is only presumptive evidence against the principal.

The position taken by Mr. Magee is conclusive proof that the Company was in fact indemnified.

A surety who has not been indemnified is permitted to control the defense of his own case without waiver or or loss of right to proceed against the principal. See Section 5655 Montana Codes quoted at length in our brief in chief on page 30.

We are not, as counsel seems to suppose, relying on

any presumption that might arise from the fact that they objected to our showing the *extent* of the indemnity.

In this connection we simply said in our brief in chief, “***having objected to the introduction of evidence on those two grounds and those alone, they would not now be permitted to contend that they were not in fact ‘*indemnified*.’ ”

It is to be remembered that the facts relating to the indemnity were peculiarly and exclusively within the knowledge of the surety company and when we produced the letter from Mr. Magee giving rise, to say the very least, of a very strong inference against the company, it was the duty of the company to rebut such inference if it was in its power to do so. The rule that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict, is applicable here.

Counsel quotes Section 5694 of the Montana Codes to the effect that a creditor is entitled to the benefit of everything which the surety has by way of security.

There is nothing in the section which conflicts with the other provision of our Code making an indemnified surety, in effect, a principal, nor is the remedy suggested by Section 5694 exclusive.

If the surety does not in the face of a threatened lawsuit see fit to surrender its security it cannot avoid liability as a principal under the terms of this section, and even did it surrender its security it would not thereby escape liability for any deficiency there might be after the security was exhausted.

III

WAS THE CONDITION REQUIRING THE APPROVAL OF THE WAR DEPARTMENT ONE TO BE PERFORMED BY THE COUNTY; OR WAS IT TO BE PERFORMED BY THE BRIDGE COMPANY?

Paragraphs three and four of the plaintiff's reply brief are devoted to a treatment of virtually the same subject and we will consider them as one.

In the first brief, that of October 1st, no pretense is made that a bridge erected without the approval of the Secretary of War would constitute a nuisance or unlawful structure, but in their reply brief this contention is urged with much earnestness.

Their present contention gives rise to the following questions:

a. Assuming that the clause requiring the approval of the Secretary of War is material for any purpose, does the performance of the clause amount to a condition precedent, or is the clause the subject of a plea in bar?

b. If it was a material condition was it to be performed by the county or by the bridge company?

c. In any event was the condition waived when the bridge company proceeded with the construction of the bridge and prosecuted the work until the completion thereof?

d. What presumption arises from the fact that the bridge company proceeded with the work—i. e. that approval was not secured, therefore all parties were acting unlawfully or that the approval was in fact secured and the parties were acting lawfully?

e. Is the court bound to presume, in the absence of

proof that a certain river is navigable water of the United States, or does the contrary presumption prevail?

f. Assuming that the river in question is navigable water of the United States, has a state the right to construct highway bridges over the same without the consent of Congress or the approval of the Secretary of War?

g. Does the record show that the United States ever took possession of the Kootenai river for the purpose of navigation or in any manner assumed control or jurisdiction over the same?

h. Was the general act of Congress relating to the construction of the bridge across navigable streams intended to apply to states acting as such; or was its application limited to those cases where the right to build had not theretofore been fully recognized by the Federal Government?

We submit that each of these questions must be answered adversely to the contention of plaintiff in error.

What is the proof with respect to the navigability of the stream and the assumption of control over it by the United States?

On page 9 of the reply brief of plaintiff in error the special Act of Congress of March 4, 1912, is set forth. This special act does not appear elsewhere in the record but we concede that the court may take judicial notice of its provisions.

On page 118 of the transcript on appeal is found the following recital.

“No testimony was offered or introduced showing that the War Department of the United States ever approved the plans and specifications for said

bridge, or granted permission for the construction of the same *and no evidence was offered or introduced by either of the parties touching the question of the navigability or non-navigability of the Kootenai river at the point where the Rexford bridge was constructed or elsewhere.*”

The only evidence then available to the court upon the question, is the bare fact that Congress passed a special act authorizing the construction of the bridge in question.

We submit that this is not sufficient to overcome the presumption that the Kootenai River is not navigable water of the United States; nor is it proof that the United States has taken over or attempted to take over control of the stream.

This question is set absolutely at rest by the decision of the Supreme Court of the United States in the case of *Williamette Iron Bridge Co. vs. Hatch* 125 U. S. 1-17, 31 L Ed. 629, hereinafter quoted at length.

It is urged by the plaintiff in error that the Courts will presume that congress acts, always within its constitutional powers.

We fully agree with counsel but inasmuch as that question is not even remotely involved in this case we cannot see where either the argument or the authorities cited in that connection are pertinent here.

It must be apparent that there is a wide difference between a case, as here, where the authority to construct the bridge is only incidentally involved and the line of cases cited by plaintiff in error in which the controversy was between persons asserting the right of navigation

and others claiming the right to maintain structures across confessedly navigable waters under special acts of Congress requiring the approval of the war department. It may be conceded that the right of navigation being general and the right to maintain the bridge being special, the burden of proof would be on the party asserting the special privilege or right.

Counsel also cites a line of decisions to the effect that the courts will not enforce an illegal contract and will take notice of such illegality even though there be no allegation to that effect.

We concede this also; but there is no pretense here that the contract in question was or is illegal or contrary to public policy.

Plaintiff in error cites the case of *Oscanyon v. W. R. Arms Co.* 103 U. S. 261. That case is typical of the line of cases cited in this connection and an examination of it shows how utterly inapplicable they are here.

In the case cited, a diplomatic officer of a foreign government entered into a contract with the Arms Co. to purchase a large number of rifles for his government with the understanding that he, personally was to receive a commission from the Arms Co.—In suit to recover the Court held the contract illegal, immoral and contrary to public policy.

By no stretch of imagination and by no process of reasoning can such cases be made applicable to the instant case—there is no pretense here that our contract or any part of it is or was illegal in any respect. It seems the parties went further than the law required and stipulated for the approval of the government of the

United States when such approval was not in any sense necessary.

NEITHER THE LAW NOR THE CONTRACT REQUIRED THE COUNTY TO SECURE THE APPROVAL OF THE WAR DEPARTMENT.

It might be conceded that it was the duty of the county to secure the passage of the Act of Congress, authorizing the construction of the bridge, provided, of course, that the Kootenai River at the point where the bridge was to be constructed was navigable water of the United States. We cannot concede for one moment that it would be in any event the duty of the county to secure the approval of the plans and specifications; whereas, in this case such plans and specifications were drawn by the Bridge Company, and the Bridge Company was to carry on the work of construction. But be that as it may, the facts are here established that the Bridge Company did in fact proceed with the construction of the bridge and carried on such work until it claimed a completion of the same; and that it received the contract price; and we are now asked to presume that the Bridge Company, as well as the county committed an unlawful act, which defendant says is a crime against the laws of the United States, and the court is asked to take official notice of the fact that such a crime was committed. In other words, they are trying to escape liability by reason of their own alleged wrongful act. And they further ask the court to go counter to all law which presumes that a public officer does his duty; that men are law abiding; and this presumption applies not only to the county commissioners, and the Coast Bridge Company, but to the

officers of the United States as well. If the Kootenai River was in fact a navigable stream, and the bridge in fact or in law constituted an obstruction, it is safe to assume that the officers of the United States would have performed their duty in the premises, and removed the obstruction, and instituted criminal proceedings in the proper court, and civil action for the recovery of the cost of removing the obstruction. There is no presumption that any stream constitutes navigable water of the United States, especially throughout its entire length; nor can such a presumption arise from the fact that in this case the county commissioners took the precaution to secure the passage of the Act of Congress. Such a course would naturally have been dictated by good judgment, regardless of the question whether the stream was or was not navigable waters of the United States. Under the laws of the State of Montana, the question of the navigability of a stream is one of fact, and the burden is upon the person asserting the navigability of such stream, to establish the same, except in those cases where Congress has declared streams to be navigable, or where the navigability of a particular stream at a particular point has been judicially determined by the courts of the United States; and there is a vast difference between the navigability of a stream under the laws of the United States, and under the various state laws. For instance, the test of navigability under the laws of Montana, is whether the stream is of sufficient depth and width to carry the products of the country, which might consist of sawlogs, shingles, lumber, etc. (Sec. 1326 R. C.). That is not the test applied under the laws of the United States,

and several courts have expressly held that although the stream be navigable for the purpose of transporting saw logs and other products of the country, it was not necessarily navigable within the meaning of the navigation laws of the Federal Government.

See Sec. 2476, Vol. 6, Fed. Stat. Ann., and notes.

It is urged that this court will take judicial notice of the rules and regulations of the principal departments of the government, and in the case of the Secretary of War, the permanent rules and regulations of the Department undoubtedly will be considered by the courts without proof, but it would be necessary of course, to identify the rule or regulation, and in any event, the court could not, and would not take judicial notice of how the ministerial and technical subordinate officers do their duty in a particular instance. In other words, this court in the absence of a showing cannot presume that the officers under the jurisdiction of the chief engineer of the War Department, did not examine and approve the plans and specifications for this particular bridge. But on the contrary the court is bound to presume that all proceedings were regular; that the commissioners did those things which the law and the contract required them to do, and that, likewise, the Bridge Company performed all of the formal acts required of them in the performance; and that the proper officers of the United States discharged their duties with reference to the subject in a proper manner; and that when the Coast Bridge Company commenced the construction of the bridge, they were not committing an act which would be a violation of the laws of the United States. The rules upon which these pre-

sumptions are predicated are so well established that it is not necessary to elaborate upon them, or call the court's attention to those provisions of the Laws of the State of Montana, which state in clear and precise terms the inference and conclusions, deductions and presumptions that may be drawn from certain conditions and states of fact.

The building of a bridge across the Kootenai River, was not an act involving moral turpitude, nor an offense at common law. That is, it was not *malum in se*, if wrong at all, which we deny. At most it was *malum prohibitum*, and if *malum prohibitum*, the facts which make it so must be pleaded, or at least established by evidence on the part of the party who relies upon it. Furthermore, the government alone could contest the right of either the Coast Bridge Company or the county of Lincoln to construct this bridge across a public stream. If the construction of such bridge was prohibited by the government the prohibition was not made for the benefit of this surety, or any private individual. The government itself is the only party who can raise the objection. But again, if as contended by the defendant, this court takes judicial notice of the detailed action of subordinate officers of the government, then this court knows that the permission referred to in the Act of Congress relating to the construction of public bridges (34 Stat. at Large, 84), was obtained. The court further knows that the moving of this center pier was a mere mathematical calculation made necessary by the shifting of the bridge toward the eastern shore of the river, which would require no specific plans being drawn therefor. It appears from the

evidence that the only connection which the county had with reference to the moving of the pier is that Mr. Geary called the attention of the superintendent to the fact that it was the wish of the Bridge Company that the pier should be moved. The superintendent then wired the Bridge Company. The county gave no direction, but the Bridge Company did give the direction and instruction. The only authority the superintendent had for the moving of this pier emanated from the contractor, and if that removal was wrong, the company and its surety is responsible for that wrong.

If the separate and specific consent of the war Department to the moving of this pier was necessary, that consent could be given after his endorsement of the main plan and specification had been obtained, and there is not any evidence here to the effect that such consent was not given.

DOES THE CONSTRUCTION OF A BRIDGE
WITHOUT THE AUTHORITY OF THE UNITED
STATES CONSTITUTE A NUISANCE, *PER SE*?

In discussing this phase of the question, we must not lose sight of the fact that the bridge at Rexford was constructed not by private persons, but by the State of Montana. The Commissioners, in their dealings with highway matters, act only as the agents of the State. In order to give any weight to defendant's contention, the Court will have to indulge the presumption that the State of Montana erected a structure which amounted to a nuisance, and subjected it to the penalties provided by the laws of the United States, and the court will further

be bound to presume that the Kootenai river was, and is navigable water of the United States. The fact is that until the government takes possession of an inland stream, either by a specific act of Congress, or by the erection of public works and improvements, the presumption must prevail that it is not navigable water of the United States, but is wholly within the jurisdiction of the states through which it flows, and subject only to their control; and even in the case of navigable waters of the United States, there is a divided responsibility, as well as jurisdiction, and the government does not undertake to take over the entire control of the stream over which it has, (by reason of the interstate commerce clause) jurisdiction. The act of Congress requiring, in all cases where Congress by special act shall authorize the construction of a bridge, and requiring the plans and specifications to be submitted to the Secretary of War, for approval, was not intended to apply to those cases where the State, as such, undertook the construction of a bridge, in order to complete and make available and serviceable a public highway, but it was intended that if the state should construct such a bridge, and Congress thereafter took possession of the stream, it might under its paramount authority order and direct that alterations be made in the bridge, so as to permit of unobstructed navigation. The law was intended only for the control of private individuals and corporations. In any event, the nuisance, if nuisance it was, was a public and not a private nuisance, and could be abated only by the United States, or by the State of Montana, and as we have before suggested, it is to be presumed, that the United

States does not regard the bridge or pier in question as a nuisance, and certainly the State of Montana cannot raise the question, inasmuch as the State itself is responsible for the erection of the bridge by officers to whom it had delegated the power to act. We earnestly submit that in order to have availed themselves of the benefit of a defense based on the clause of the contract in question, it was necessary for the defendant to set it up as an affirmative defense, and allege among other things that the plans and specifications were not submitted to or approved by the War Department. That the Kootenai river at the point where the Rexford Bridge was constructed, was in fact navigable water of the United States, and that the United States had not by inaction tacitly or otherwise left all matters pertaining to the control of the stream to the State of Montana. Such a plea being interposed, the burden of proving it would have devolved upon the defendant, and we would be permitted to show under appropriate pleadings that the Bridge Company assumed the responsibility of obtaining the approval of the Secretary of War—that such approval was in fact, obtained—that the Kootenai River was and is not navigable, at the point where the Rexford bridge was constructed or elsewhere.

It is also to be noted that the Act of Congress does not make the mere failure to secure the approval of the plans and specification, a public offense. It does provide, however, that in the event the Secretary of War shall deem the structure an obstruction to navigation, he shall give notice to the persons responsible for its erection, to remove it within a specified time, and the failure

to remove, constitutes the offense. But even in this respect, the discretion of the Secretary is subject to the control of the Courts, and it cannot be arbitrarily exercised.

U. S. *vs.* Moline 82 Fed. Rep. 592. 21 Op. Atty. Gen. 430.

U. S. *vs.* Rider 10 Fed. Rep. 406. 20 Op Atty. Gen. 101.

In the case of *Cummings vs. Chicago*, 188 U. S. 430, the Supreme Court of the United States, says:

“The decision in *Lake Shore & M. S. R. vs Ohio* was rendered before the passage of the river and harbor act of 1899. But the 10th section of that act, upon which the permit of the Secretary of War was based, is no so worded as to compel the conclusion that Congress intended, by that section to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits. We may assume that Congress was not unaware of the decision of the above case in 1897 and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifest-

ed by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended."

Again in the same case at page 428 the court says:

"The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other states, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state, or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unneces-

sarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 245 7 L. ed. 412, decided in 1829, and *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96, decided in 1865.”

“To the same effect is the recent decision in *Lake Shore & M. S. R. Co. v. Ohio* 165 U. S. 365, 366, 368, 41 L. ed 747, 748, 17 Sup. Ct. Rep. 357, See also *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423, and *Huse v. Glover*, 119, U. S. 543, 30 L. ed 487, 7. Sup. Ct. Rep. 313.”

The doctrine of *Cummings vs. Chicago* was approved and restated in the case of *Montgomery vs. Portland* 190 U. S. 104.

Reasoning in the abstract, it would seem logical that a stream is presumed to be wholly within the jurisdiction of, and under the control of the State and that where a right is predicated on the limited power of the Federal Government, the burden of alleging and proving that such right actually exists would be upon the person

asserting it. When the navigability of the stream as an interstate proposition, is once established, of course the power of the Federal Government is paramount. But, that has nothing to do with the question as to whether the stream is in fact navigable water of the United States, for its entire length, even though it may flow through two or more states. In the case of *Morse vs. Home Ins. Co.* 30 Wis. 496, 11 Amer. Reporter, 580, it was held that the Fox and Wolf rivers above Oshkosh in Wisconsin are not public waters of the United States and Mr. Farnham in his work on *Waters and Water Rights* Vol. 1 Page 68, says:

“Whenever in its course, the stream ceases to be a public highway for commerce between states, its national character terminates, and above that point it is within the exclusive jurisdiction of the state, and may be closed by dams and levees, and the same is true with respect to streams which are navigable only within the limits of the state.”

On page 69 Vol. 1 of the same work, the author says:

“The states having the right to obstruct the navigable rivers of the United States to some extent, until Congress assumes jurisdiction over them, the question arises: What is such assumption of jurisdiction?”

“The mere proprietary right which the general government has in the streams is not sufficient to exclude state action. Among the first acts of Congress after the organization of the Federal government was the passage of an ordinance of the government of the territory northwest of the Ohio river,

is known as the ordinance of 1787. It provided that the navigable waters leading into the Mississippi and St. Lawrence rivers should be and remain common highways, forever free, without any tax, impost, or duty thereon. While the territory retains its territorial form of government this ordinance is operative to prevent the obstruction of the streams, but it ceases to have any operation when the states are admitted into the Union; unless its provisions are perpetuated by the states, as has been the case in some instances. Before it was established that the ordinance was superseded there was much discussion as to its force; but it was generally conceded that it did not prevent the bridging of streams, or such obstruction as tended to the improvement of the navigation. The acts admitting the various states into the Union have, in most cases, contained provisions similar to those in the ordinance of 1787; but these provisions do not assume such jurisdiction on the part of Congress over the streams as entirely to prevent obstructions by the states. The granting of coasting licenses by the United States does not confer rights which will prevent the states from obstructing streams; nor does the appropriation of funds for the improvement of the streams. To preclude actions by the states there must, therefore, be something in the nature of direct legislation on the part of Congress, or a clear indication of intention to assume the jurisdiction, although much of the legislation dealing with the navigable waters has been of such a character as to indicate such intent. It has

been held that the provisions of the act of September 19, 1890, which forbade the erection of structures which would obstruct waters of the United States, was not intended to be retroactive, or to affect existing structures. When Congress refers to inland waters in statutes creating rights or giving actions on such matters, it includes a sound lying wholly within a state."

Assuming that the Kootenai river is navigable at Rexford, and also assuming that the plans and specifications were not approved by the Secretary of War, it does not follow that the bridge is a nuisance. In the case of Iverson vs. Dilno the Supreme Court of Montana says:

"Any right asserted to the use of the public highway must be understood to be limited (a) By the extent of the use; (b) By the character of the use; (c) By the right of others to use the same highway and possibly by other considerations."

And again, in the same case, the Court says:

"The annoyance, interference or injury, must, however be a substantial one, as distinguished from a mere technical violation of plaintiff's rights. '*De minimis non curat lex.*'"

Iverson v. Dilno, 44 Mont. 270.

It will not do to say that when Congress passed the Act of March 4, 1912, authorizing the construction of the bridge, it thereby intended to or did assume jurisdiction over the Kootenai river. It was the most natural thing in the world for the County, as well as the Bridge Company, to provide against future contingencies and conditions by securing in advance the consent of Congress

to construct the bridge, and it was the most natural thing in the world for Congress to grant such permission regardless of whether the stream was or was not, in fact, navigable water of the United States, and regardless of the question whether Congress regarded the stream as navigable. The giving of the consent of Congress was a perfunctory matter, and the asking of such consent was an act of prudence, so that in the event the government should thereafter take over the control of the stream, the State would be protected in its occupancy, and furthermore it was an act of prudence on the part of the State to secure such permission to the end that if after the work of construction should be commenced, the War Department, should through its various agencies take the position that the stream was navigable water of the United States, and commence proceedings to enjoin construction of the bridge. But these are all matters of prudence and expediency, which, while they would influence the minds of public officers about to expend a large sum of money upon public improvements, do not change the fact that the Kootenai river at the point indicated, was not, and is not navigable water of the United States; nor does it change the rule regarding the individual or person who asserts a right, based upon the navigability of a stream, to plead and prove such navigability. To begin with, the State of Montana is the owner of the bed of the stream, and has jurisdiction and control of both banks, subject only to the proprietary right of those individuals, if any, who may own the banks, and subject, of course, to the paramount right of the United States to declare the stream navigable. This doctrine is clearly laid down in

the case of *Scott vs. Lally*, 33 Supreme Court Reporter, 242 holding that the State of Idaho is the owner of the bed of Snake River. This is the rule recognized from the time of the establishment of the government, and in this respect all new states are admitted into the Union under the same terms as the original states.

In the case of *Mauldin vs. Central of Georgia Railway Company*, 61 Southern Reporter, 947, the Supreme Court of Alabama, quoting from the decision in the case of *Gilman vs. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, says:

“It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

* * * The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal Constitution. It has not been taken from the states. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. ‘When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.’ ”

And again quoting from the same decision by the Supreme Court of the United States, the Supreme Court of Alabama says:

“It must not be forgotten that bridges, which are

connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation. The states may exercise concurrent or independent power in all cases but three”:

“(1). Where the power is lodged exclusively in the federal Constitution.”

“(2) Where it is given to the United States and prohibited to the states.”

“(3). Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively.”

Quoting from the decision of the Supreme Court of the United States in the case of *Cardwell vs. Bridge Company*, 113 U. S. 210, 28 L. Ed. 959, the Supreme Court of Alabama in the case above referred to, says:

“When Congress acts directly with reference to the bridges authorized by the state, its will must

control so far as may be necessary to secure the free navigation of the streams. In *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 (7 L. Ed. 412), a dam had been constructed across a small navigable river in the state of Delaware, by authority of its Legislature; and this court held that the obstruction which it caused to the navigation of the stream was an affair between the government of the state and its citizens, in the absence of any law of Congress on the subject."

In the case of *Sumner Lumber and Shingle Company vs. Pacific Coast Power Company*, 131 Pac. 220, the Supreme Court of Washington, says:

"The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact, and he who asserts it must prove it. To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable."

* * * * *

"When a stream claimed to be navigable is not meandered nor declared navigable by the Legislature, it is presumed to be non-navigable, and the burden is upon the party claiming it to be navigable to show that it is so in fact."

Bissel v. Olson, 143 N. W. 340 (N.D.)

In the case of *State ex rel Foster vs. Ritch*, 49 Mont. 155, the Supreme Court held that a bridge is not County property, and that high-ways, and the bridge is a part of

a high-way, belongs to the public, and it follows that when a bridge is erected as a part of a public road by a Board of County Commissioners, those officers are acting only as a governmental agency of the State.

See also *Bonnerville County vs. Bingham County* "Ida." 132, Pac. 431. also *State ex rel Donlan vs. Board*, 49 Mont. 517.

As already shown, the Congress and courts of the United States have from the very beginning recognized the rights of the States to construct bridges, even upon navigable streams over which the government had assumed jurisdiction, and control, and in the protection of this right, the Federal courts have been just as jealous as the State courts, and it would be new doctrine now to assert that the state having a sovereign exercising this recognized right could be charged with creating or maintaining a public or private nuisance, and that the exercise of the power, standing alone, amounts to a nuisance, or in other words, a bridge erected by the State is a nuisance, *per se*, or the construction of a bridge by a state is a *prima facie*, unlawful.

We apprehend that notwithstanding the Act of Congress of 1906, such a doctrine will find no countenance in the courts, state or federal of this country. It is clear that the act of 1906 was never intended to apply to bridges constructed by a sovereign State acting directly as such, as is the case here.

Section 1 of the Act provides:

"That when, *hereafter*, authority is granted by Congress to any *persons* (italicising ours) to construct and maintain a bridge across or over any of

the *navigable waters of the United States*," etc. (italicising ours).

1. What did Congress have in mind in using the term "*persons*"? As we shall show hereafter neither the state nor the United States is a *person* and:

2. What was meant by the words: "*When hereafter authority is granted, etc?*" and

3. What was meant by the use of the words, "*navigable waters of the United States?*"

When Congress used the term "When, hereafter, authority is granted, etc." it clearly meant to embrace only those classes of cases where it was necessary to have a special act of Congress in order to confer the authority to build the bridge, and related not to rights existing at the time of the passage of the act. As we have heretofore suggested, the right of a state to construct bridges across navigable and non-navigable streams has always been recognized by Congress and by the Federal courts, and therefore it could not under any possible condition have been contemplated by Congress that the Act of 1906 should be applied in cases whereby states under their sovereign, established and recognized powers undertook the construction of bridges, even over navigable waters of the United States the law was intended clearly to apply to those cases where individuals or corporations not exercising powers belonging to the state should thereafter undertake to construct a bridge. As was suggested by the Supreme Court of the United States in the case of *Cummings vs. Chicago*, 188 U. S. 430, in construing an earlier enactment. Congress at the time of the passage of this act must have known of the doctrine laid down re-

peatedly by the Supreme Court touching this right of the State to construct bridges, for the benefit of the public and in the interest of commerce, interstate and intrastate. By the term "navigable waters of the United States," of course Congress must have meant waters that are in fact navigable waters of the United States and not waters which might hereafter be taken over and controlled by the federal government. The interpretation here contended is also borne out by the subsequent sections of the Act.

Section 2 provides that any bridge constructed under the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route upon which no higher charges shall be made for the transmission over the same of the mails, troops and munitions of war of the United States. States are not in the business of establishing toll bridges or toll roads, and when it constructs a bridge it is for the use of the public, and there can be no such thing as a charge to the individual using it.

Section 3 gives railroad companies desiring the use of any railroad bridge built under the provisions of this Act, equal rights and privileges relating to the passage of railroad trains or cars over the same.

Section 5 provides a penalty for refusal or failure to comply with the orders of the Secretary of War in regard to the construction or maintenance of the bridge. Certainly no fine could be imposed on the State of Montana.

Section 6 provides that if no time is fixed in the special act for the commencement and completion of the bridge, work shall be commenced within one year and completed within three years from the date of the passage of the act.

Section 7 provides that the word "persons" as used in

the Act shall be construed to import both the singular and plural and shall include "municipalities," "quasi municipalities," "corporations," "companies" and "associations." The maxim "*expressio unis alterus est*" is applicable to this last Section, and surely if Congress intended to take from the States the general right to construct bridges and make such right dependent upon a special act of Congress in each case, it would have said so in plain and direct terms, and not left it to the courts to take away such power by a strained construction of the law.

If we clearly understand the decision of the highest court of the land upon this subject, this power on the part of the State was existent before the adoption of the Federal constitution, and is one of which it should not lightly or without clear and unmistakable authority be deprived; and there is no difference in this respect between the State of Virginia and the State of Montana. The new states have all been admitted into the union under the same terms as the original thirteen states, and there is not one line in the enabling act admitting Montana into the union which impairs its powers in this respect, nor is there one line in the constitution of the State or of the ordinances adopted in connection with it which surrenders this right. Of course, it might be urged that the term "municipal corporation" and the term "quasi municipal corporation" as used in Section 7 bring counties within the purview of the act, but as a matter of law and fact a Montana County is not even a quasi municipal corporation. The supreme Court, it is true, speaks of it as a sort of "quasi municipal corporation," but the words are used merely in a general descriptive way. The fact is, that a Montana

county is purely and simply a governmental agency of the State, having no power except to build and construct roads, as the agent of the State, to care for the poor, as such agents to provide facilities for holding court, making assessments and providing for the housing and keeping of public records, transfers of property, etc. They have no power to own or control real or personal property. They have no power to engage in business of any kind even to the extent of furnishing the inhabitants of the County with light and water or doing or performing any of the functions of a municipal corporation or a quasi municipal corporation as it is generally understood. Even if the counties were intended to be included in the definition still the statute would not apply to counties constructing bridges under direct authority of the State, as in that case it would not be necessary for Congress to authorize such work by special act. As it necessarily follows from the power reserved to the State that it may delegate the power to the several counties. But a county in the construction of a bridge does not act under delegated powers as a private corporation does when it exercises the power of eminent domain, but it acts directly as the agent of the State, just as the laborers upon the bridge would act if they were employed directly by the officers of the State or by the legislative assembly.

The case of *Missouri vs. Illinois*, 200 U. S. 5, (The Chicago Drainage case) observes the distinction between acts committed by individuals and acts done by a State, as amounting to or constituting a nuisance. The following excerpts from the decision by Mr. Justice Holmes are in point.

“It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court. *But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State.*” (*Italics ours*).

And again the Court says:

“Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”

“Subject to limitations existing or imposed in relation to navigable waters of federal or State constitutions or by federal laws and until the power of Congress over navigable waters and to regulate commerce is called into action, a State has power to authorize the erection, construction and maintenance of bridges over navigable waters within the State. * * * * * .”

Joyce on the Law of Nuisances, Sec. 274.

“That a State has power to authorize the building of bridges over navigable waters, although they may to a certain extent obstruct navigation, is a well

established doctrine. This power, however, is held to be subject to the exercise of the power of Congress to regulate navigation.”

2 Amer. & Eng. Ency. of Law, Page 546.

In the *Wheeling Bridge case*, *Pennsylvania vs. Wheeling and Belmont Bridge Company*, 13 Howard (U. S.) 518, 14 L. Ed. 249; 18 Howard (U. S.) 421, 15 L. Ed. 435, Mr. Justice Holmes said:

“In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of.” the State. 16.

See page 348, Joyce.

Mr. Joyce, in his work on nuisances at page 349, Section 274, says:

“But it is held that a bridge over a navigable stream is not indictable as a nuisance where it is erected for a public purpose, leaves a reasonable space for the passage of vessels and produces a public benefit.”

Quotation citing *Miss. & Mc. R. R. Co. vs. Word*, 2 Black (U. S.) 485.

The Supreme Court of the United States makes short work of this question in the case of *Iring vs. Ives*, 222 U. S. 235, 56 L. Ed. 364. In that case a marine railroad projected its line of road beyond the harbor line established by the Secretary of War conformably to the Act of March 3, 1899, 30 Stat. et L. 1151, Chap. 425 U. S. Compiled Statutes, 1901. The plaintiff in error negligently suffered his vessel to collide with the structure and was thereupon sued for damages. A judgment was rendered against him and he finally reached the Supreme Court

of the United States on writ of error. It is to be noted in connection with this case that the Secretary of War was given authority to establish hargor lines and also provided that whenever any, "bridge, dam, dyke or causeway over or in any port, roadstead, haven, harbor" etc. should be contemplated, the plans of such structure should be submitted to the Secretary and approval of that official obtained.

6. Fed. Stat. Anno. 805.

The court, by Mr. Chief Justice White, says:

"The basis of the assumed Federal right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899, under the sanction of state authority. *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525, 23 Sup. Ct. Rep. 472. See also *Lake Shore & M. S. R. Co. v. Ohio*, 165, U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357. In view of the character of the case, the facts found by the court below, and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be, Dismissed for want of jurisdiction."

Upon the question of the effect of the special Act of Congress authorizing the construction of the bridge at

Rexford, as an assumption of Federal control, the attention of the court is invited to the decision of the Supreme Court in the case of *Williamette Iron Bridge Company vs. Hatch*, 125 U. S. 1-17 31 L. Ed. 629. In that case it was contended in support of the Federal jurisdiction, first: support of the Federal jurisdiction, first:

That the Act of Congress admitting Oregon into the union contained this clause, "That all the navigable waters of the state shall be common highways and forever free to all citizens of the United States," without any tax, duty, impost, or toll therefor.

2. That Congress had established a port of entry at the City of Portland in the Williamette River, and had required vessels which navigated it, to be enrolled and licensed therefor.

3. That Congress had frequently directed the improvement of the navigation of the river and appropriated money therefor.

4. *That Congress had, by an act approved February 2, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon the river and to prevent obstruction to the navigation of the same, and in the act declared, "But until the Secretary of War approves the plan and location of said bridge and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced."*

The court disposes of the provision of the enabling

act by saying that the provisions thereof did not relate to physical obstructions of the river, but to the political phases of the question only. *The court further found that with regard to the Willamette River three acts of Congress had been passed authorizing the construction of the bridges thereon.* One at Portland, one across the river at Salem, one which authorized the Oregon, California Railway Company to build a bridge at Portland. The first act gave the authority to the City of Portland. The second act gave the authority to the County Commissioners of Marion County, and third act gave the authority, as before suggested to a railroad company. With reference to these acts, the court says:

“These Acts are special in their character, and do not involve the assumption by Congress of general police power over the river.” (Italics ours).

Touching the contention that in consequence of having expended money in the improvement of the river and in making Portland a port of entry, the court says:

“The argument of the appellees, that Congress must be deemed to have assumed police power over the Willamette River in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate.”

See also United States vs. Bellingham Bay Boom Company, 26 C. C. A. 547.

IS A STATE AS SUCH, EMBRACED IN THE TERM "PERSON" AS USED IN THE FEDERAL STATUTE OF 1906 RELATING TO THE CONSTRUCTION OF BRIDGES ACROSS NAVIGABLE WATERS?

In determining this question, a clear distinction must be observed, viz: A state may act in its sovereign capacity and it may also act in its capacity as a proprietor. In the latter capacity, it has been regarded as a person—for instance under the Federal laws requiring the payment of excise tax on the sale of intoxicating liquors, states having dispensary laws and engaged in the sale of intoxicating liquors are deemed to be persons within the meaning of the law, requiring the payment of the tax, but it is not always, even where the government is acting in its proprietary capacity, that it is treated or regarded in law as a person; for instance—the Supreme Court of the United States held that the United States was not a "person" as used in a statute providing that a devise may be made to any person capable by law of holding real estate.

See *United States vs. Fox*, 94, U. S. 315.

The term "person" as used in the acts of Congress, touching internal revenue, does not include a state.

United States vs. Baltimore & O. R. Co. 84, U. S. 322.

In *State vs. Brown*, 10 Ark. 104, 107, it was held that the state is not to be included within the statute in reference to prosecutions for trespass on *persons* or property.

In the case of *West Coast Manufacturing and Investment Company vs. West Coast Improvement Company*,

66 Pac. 97-103, 25 Wash. 627, 62 L. R. A. 763, it was held that "person" in its ordinary legal significance does not embrace a State or Government.

In *Attorney General vs. Sullivan*, 40 N. E. 843, 163, Mass. 446, it was held that information in the nature of *quo warranto*, filed by the Attorney General in the Supreme Judicial Court, to test one's right to a public office, is not a controversy

"between two or more persons"

within the meaning of the declaration of rights, securing the right of trial by jury.

In the case of *McBride vs. Pierce County Commissioners*, (U. S.) 44 Fed. 17, 18, it was held that a State is not a "person" within the ordinary or legal definition of that word.

In the case of *Butler vs. Merritt*, 38 S. E. 751, 752, 113 Ga. 238, it was held that a law making it unlawful for any person to sell intoxicating liquor did not apply to the state.

In the case of *State vs. Harmon*, 50 S. E. 828, 830, 57 W. Va. 447, it was held that a code provision requiring the owner of property sold for taxes to tender to the claimant of the tax title the taxes and interest required to be refunded, relates to persons, and does not apply to the state.

In the case of *Fowler vs. Rome Dispensary* 62 S. E. 660, 663, 5. Ga. App. 36, it was held that dispensary commissioners are officers of the State and not sueable as such under the code provisions giving a parent a right of action against any person selling spiritous liquor to his minor son.

In *Osterhoudt vs. Keith*, 117, N. Y. Supp. 809, 810, App. Div. 83, it was held that the State was neither a person nor a corporation nor a municipal corporation.

The United States is not a "person within the meaning of the Bankr. Act. of July 1, 1898 c. 541, 30 Stat. 563, *Title Guaranty and Surety Company vs. Guaranty Title and Trust Company* 174 Fed. 385, 387, 98 C. C. A. 603.

V.

Under subdivision V of their brief counsel, in order to make the facts fit their theory of the law, have carried argument to a point where the disposition to discuss the question in a serious vein is taxed to the utmost limit.

It is there gravely contended that although the bridge company voluntarily departed from the plans and specifications and erected a bridge differing (as they claim) materially from that called for in the plans, the county by reason of its acceptance made a new contract and thereby discharged the sureties.

This is carrying the doctrine that sureties are favorites of the law to an extent unheard of before in any court.

If counsel's theory is correct it became and was the duty of the county upon completion of the bridge to refuse acceptance and commence suit against the sureties for such damage as it might have sustained by reason of the departure from the plans and specifications or be barred from holding such surety for any damage which might thereafter result from undiscovered or unknown defects.

The sureties contract was that the bridge company

would construct the bridge “strictly according to the plans and specifications” and they cannot complain because the county waived its right to the departure in question, if there was in fact a departure.

There was not any sense in the making of a new contract nor an alteration of an existing one.

It must be remembered that we are not suing to recover damages sustained by reason of an apparent defect or or one reasonably discoverable—but on the contrary one not known and not discoverable until after the collapse of the bridge.

There was and could be no ratification of any contract made by Commissioner Garey for the reason that the commissioner did not attempt to make any contract and his knowledge is not imputable to the board as a whole.

Smith v. Zimmer, 45 Mont. (On rehearing) at P. 395.

A contract not valid or binding which attempts to modify or alter the original contract does not discharge the surety.

Gordon v. Second National Bank, 144 U. S. 97.

See also Section 5674 , Montana Codes, which which reads as follows: “A promise by a creditor which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy within the meaning of the last Section.”

VI.

Under subdivision VI. counsel seek to shift the responsibility for the failure to sink the center pier to a solid foundation from the shoulders of the Bridge Com-

pany to that of the County.

In order to make any headway on this point counsel assumed certain things to be established by the evidence which are not in fact so established and in proof of which little, if any evidence appears in the record.

It is urged that if the concrete pier had been carried to the proper depth the bridge would not have collapsed and that the County's engineer, if competent, would have directed the placing of the pier at the proper depth in the bed of the stream.

See Reply Brief, P. 23.

This assumes, as a matter of fact, that the construction of the pier in the manner indicated would have avoided the collapse and assumes as a matter of law *a.* that the board had a right to employ the so-called county engineer in the capacity of superintendent of bridge construction, and *b.* it was its duty to do so.

None of these contentions are tenable.

As to the fact assumed—the only testimony in support of it is found on page 104 of the record. There Mr. Raynor, on behalf of the plaintiff in error, testified that if he had had his way he would not have used piles in the center pier but “would have carried the concrete down lower.”

He does not say that in such event the bridge would have collapsed nor does he say that the bridge would have been more stable or secure. He does not say that he was prevented from having his way by any official of the County. He was in Portland most of the time during the course of construction and the Company had another superintendent in charge of the work. If Mr. Raynor was

prevented from having his way it must have been on account of a disagreement between him and the officials or employees of the Bridge Company.

[In our Brief in Chief; (P. 53) we made the same mistake as to what the record really shows in this respect as counsel for the plaintiff has made in the several briefs filed by him. Our mistake was due to the fact that in our hurry to prepare and print the brief in time for the hearing we were compelled to use portions of the brief submitted to the trial court and reference was had to the record as it appeared in that court.

See also decision of trial court. Bot. P. 123]

The omission from the transcript of all the evidence on this point and that relating to the matter of driving the piles to refusal, as well as the failure to assign the ruling of the court in this respect as error, ought to be sufficient to warrant the court in refusing to consider the question.

As a matter of fact Mr. Raynor did have his way as will be shown by an examination of the record.

We assume that the original plans have been filed in this court as exhibits, and if the court will examine the plan as to the depth of proposed excavation and will compare the plan with the testimony of Mr. McClayn that the excavation was made to a depth of eight feet six inches (Record P. 106) it will be seen that the plans were disregarded, as far as the depth of the excavation was concerned.

And this also disposes of the contention that the depth of the excavation was under the control of the County as it evidences the interpretation put on the contract by the parties themselves. There is no pretense that the County

ordered this additional excavation or even had knowledge of it, and the bridge company in pursuance of its undisputed right in the premises carried the excavation down to the point indicated by Mr. McClayne's testimony.

Nor can the language of the clause quoted on page 17 of their reply brief justify the claim that the County had control of the extent of the excavation or the amount of concrete to be used.

The clause provides that the County has the option of *deducting* from the amount of the concrete and this is the limit of the County's authority. On the other hand the bridge company agrees to "furnish and construct in place any additional concrete *required in said pier* below water level" the contract is not to construct in place any additional concrete *required by the County*, but additional concrete *required in the pier*, and inasmuch as the company undertook to build "a perfect bridge" the privilege of using such amount of concrete as might be necessary to that end was of necessity left to it.

As to the assumption that it was the duty of the board to supervise, or have the County engineer supervise, the construction of the bridge, that contention is equally untenable.

On pages 43 and 44 of our brief in chief we call attention to the provision of Section 1413 and 1414 of the Montana Codes.

These sections absolutely limit the power of the board with respect to the construction of bridges and confer no authority to supervise. The board, after a bridge has been completed, may send one of its members to make inspection, and there its authority ends.

The words "inspection" and "supervision" are not synonymous, and as suggested in our brief in chief the courts of Montana have always limited the powers of the board practically to the letter of the statute.

But counsel contends that under the act of March 11th, 1909, the county surveyor is given general charge and supervision of the work.

The act of March 11th, 1916, is not available here.

The Rexford bridge was not a part of "*a main highway*" within the meaning of the statute under consideration.

The act in question is a law relating entirely to main highways to be constructed in pursuance of special provisions upon petition of abutting owners largely at the expense of such owners. It has no reference to the general highway law of the state under which the Rexford bridge and its approaches were constructed.

In other words the Rexford bridge is not on "*a main highway*" but the bridge and the highway upon which it is located was built with the proceeds of a bond sale and as before suggested, under the general law of the state.

Counsel cites the provision of Section 1387 and 1389 Montana Codes.

We have had occasion to refer to these provisions elsewhere and it is to be noted that they impose a limitation not only on the power of the board to inspect (not supervise), *but upon the county surveyor also*, and Section 1388 of the same Code limits the compensation of the board member and surveyor to "*inspection.*"

But counsel further contends that the *contract* requires the board to supervise the construction of the

bridge. Nowhere in any of the briefs filed by them do they point to a single paragraph which imposes such duty and we will content ourselves with the assertion there is no such provision to be found anywhere in the record.

For the reasons herein given the authorities cited under the sixth subdivision of the reply brief are not in point here.

The bridge company undertook to build a bridge according to certain specifications; the surety promised that the bridge company would carry out and perform its contract; the bridge company did not drive the piling in accordance with the specifications, by reason whereof the bridge collapsed.

It seems to us the issue is a simple one and the logic of the trial court unassailable.

VII.

Under paragraph VII. of the reply brief the case of *Blackburn v. Morel* is cited to sustain the contention that the clause in the contract authorizing changes is not broad enough to warrant the departure from the terms of the latter with respect to payments.

In their various briefs they have cited a number of cases to sustain their view but it is pertinent here to say that none of them including the *Blackburn v. Morel* case are in point. Quoting from p. 24 of the reply brief we find the following extract from the decision in the case referred to:

“The fact that the contract provided for change and alterations in the *plans* of the building has no bearing,” etc.

The vital difference between that case, and all the oth-

ers cited, and the case at bar is this—In the cases cited authority to make changes was limited to the “*plans*” or “*plans and specifications*” while in the case at bar authority is conferred to deviate from the “*contract*” as well as to order alterations, additions or omissions from the *contract*, plans and specifications.

But even if the authority conferred by the clause in question were not broad enough to warrant the departure from the terms of the contract the question is set at rest by the decision in the case of *Dodd v. Vocovich*, 38 Mont. 188.

Under the rule laid down in that case, no change in the terms of contract will release the surety, unless such change results to the detriment of the surety, and the only change in this contract which could have resulted to the detriment of the surety, so far as the time of payment of the contract price is concerned, would be with reference to the condition of the bond, which guarantees that the contractor will pay for all the material and labor—and of course, if the payments had been prematurely made, and the contractor had failed to pay for his material or labor, and liens were filed against the bridge as a result; or individuals for whose benefit that clause was inserted in the contract, had commenced suits against the surety company to recover for wages or material, then it might be contended that the change as to payments resulted to the damage or detriment of the surety, but not otherwise, because there is nothing in the bond nor in the contract which in any way limits the county in making payment, or the Bridge Company receiving payments. This is the rule laid down by Brant in his work

on suretyship and guaranty, and the rule is there clearly stated that premature payments release the surety only where surety is prejudiced by reason of having to pay the debt of the principal.

See 2 Brant on Suretyship & Guaranty, 750 (3 Ed)

As to what changes are deemed material, see:

23 Howard, 150;

Harper v. National Life Co., 56 Fed. 281;

Finley v. Bullard, 78 Fed., 866;

Guaranty Co. v. Press Brick Co. 191 U. S., 416.

In our brief in chief, we invited the attention of the court to the provisions of the Montana Codes relating to the exoneration of guarantors but inadvertently omitted reference to the provisions relating to sureties.

Inasmuch as the contract, plans, specifications and bond constitute but one contract by the terms of which both the construction company and the surety company are bound, the relation is that of principal and surety.

The provisions of the statute peculiarly applicable here are found in section 5686 and are as follows:

“Surety is exonerated:

“1. In like manner with a guarantor.

“2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his surety or

“3. to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.”

Here is a legislative modification of the doctrine that sureties are favorites of the law and an application of

the modern doctrine that before a surety claim a discharge by reason of changes in the terms of the contract he must show injury.

Dodd v. Vocovich, 38 Mont. 188.

VIII.

In paragraph VIII of their reply brief counsel argues that plaintiff's case fails because of the fact that payments were not made according to the contract.

This of course is on the theory that there was a *variance*—but under the practice of this state a *variance* is not fatal unless the adverse party is misled to his prejudice; and timely objection must be made.

In this case the defendant not only suffered our proof of payment to go in without objection but supplemented it with the vouchers, showing that county warrants had been issued in payment and at no time was the attention of the trial court called to the so-called variance.

We submit, of course, that there was in fact no variance but even if there was it is too late to urge it now.

Kalispell Liquor & Tobacco Co. vs. McGovern 33 Mont. 394.

X

In paragraph X counsel insist that the question of the approval by the War Department or want of approval was interposed in time.

The complaint shows that the parties acted on the contract and proceeded with the construction of the bridge.

If under any view of the case the clause in question was a material one it was the subject of a *plea in bar and should have been set up in the answer.*

AS TO THE "SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR."

The brief referred to is for the most part devoted to a restatement of the argument contained in their brief in chief and in their reply brief and we will not attempt to answer in detail the arguments there advanced. For the most part the points attempted to be made in the brief in question have been answered herein and in our brief in chief. A line of reasoning characteristic of the entire brief found on page 68 and we will indulge in a few brief comments thereon.

On the page referred to after quoting from the decision of the trial court on the subject of the driving of the piles, they say :

"For, as the court says in its opinion, it was mere conjecture as to whether the bridge would have fallen away if the required piling had been used in the required manner."

If the finding of the court had been as counsel interpret it, the judgment would have been for defendant and not for plaintiff.

Throughout all of their briefs counsel have sought to put strained and unwarranted constructions on the facts and law to make them fit their theory of the case but this is the first and only attempt to take such liberties with the decision of the trial court.

What the court really did say was that,

"*Counsel's theory* that the bridge might have collapsed had the piles been driven to whatever unknown depth *was 'mere conjecture' and not permissible.*"

See Record p. 123.

It is to be noted that the last three words ("and not permissible") are omitted from counsel's quotation of the sentence as found on page 68 of the brief in question.

In all of their briefs counsel assert that we are not entitled to recover for the reason that we do not allege performance of the terms of the contract on our part. The rule is not applicable in a case of this kind, but even if it were, we have fully complied with it in every respect. The contract is attached to the complaint and its terms are clear. The only condition to be performed by us is *to pay for the bridge*. We have alleged and proved performance of this condition.

Respectfully submitted,

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No. 2825

IN THE

**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

PETITION FOR REHEARING

**Upon Writ of Error to the United States District Court
of the District of Montana.**

Filed

FEB 1 - 1917

F. D. Monckton,
Clerk.



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Counsel certificate in original

We ask the indulgence of the Court to present the argument hereinafter set out because as we read the opinion in the case the following grounds of argument are not fully disposed of thereby, and the argument hereinafter set out convinces us beyond fair debate that the case as finally decided should adopt as controlling the principles hereinafter referred to.

APPROVAL OF PLANS AND SPECIFICATIONS

With regard to the proviso in the contract of December 18, 1911 (p. 66 Transcript), to the effect:

“It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge.”

We contend that under this provision, it was an agreement that the plans and specifications must be approved for use at this particular place before the contract so far as the surety was concerned would become effective. We also contended that the burden of proving compliance with this provision was upon the County for two reasons:

- (a) That otherwise the bridge would be an unlawful structure.
- (b) That the provision is a material part of the contract.

And consequently that the Surety would not be bound unless it was shown that the bridge, concerning which suit was brought, was one built upon plans and specifications approved by the War Department.

The opinion in the case proceeds upon the ground that the contract having been performed, it will be presumed that this consent was obtained, as it was necessary to a lawful construction, and that there is no evidence that the Kootenai River was a navigable stream.

Your Honors will see that our contention is to the effect that this provision separate and apart from any question of nuisance was a provision which had it been complied with would have made a material difference to the Surety. The question as to the necessity of obtaining the approval of a third person before a contract becomes effective is a different question than the one of whether or not the bridge if constructed without such approval is a nuisance.

Let us suppose that this contract provided that it should not become effective until the plans and specifications had been approved by John Brown of London, England. Manifestly the parties would have a right to make such a contract and to so condition it; and then let us suppose that John Brown was actually disregarded by both the County and the Contractor. The Surety's obligation is, of course, fixed by the contract and its principal

cannot waive the Surety's rights nor increase them. It would not be incumbent upon the Court to inquire as to why the Surety was willing to guarantee a contract to be performed upon plans approved by John Brown. It is enough that that is the contract which the Surety did guarantee. The fact that the War Department of the United States is specified instead of John Brown does not alter the meaning of the plain words of this contract nor give the principal any greater right to by his conduct waive the rights of the Surety. If the County and the Bridge Company did erect this bridge without obtaining the approval of the War Department, we take it that it would not matter whether it was the County or the Bridge Company who was responsible for this neglect. The duty certainly was upon the County in face of the plain words of this contract to know whether this provision was being complied with. It is a fact that if the complaint alleged or the proof showed that the contractor had surreptitiously or by imposition upon the County procured the County to allow it to build this bridge without obtaining this approval, then, of course, the County could not be charged with the default of the contractor, but where the bald provision is pleaded and no allegation made that it was waived or performed, it seems to us that this Court is not concerned with the question of who was at fault in the failure to

comply with this provision of the contract. The most that is claimed is that it was equally the duty of the County and the Bridge Company if not more the duty of the Bridge Company. Well, suppose it was the duty of the Bridge Company and the Bridge Company by and with the action of the County erected this bridge and the approval was not had. Would this Court establish then as a principle of law that the Surety is liable notwithstanding? In nearly every case where a change or departure has been made from the contract of suretyship, you will find that the principal of the bond is the one who actually instigated the change or departure. This is always true as to advance payments and nearly always true as to changes in character of work, and if Your Honors are settling the law as being that the Surety is liable if its principal requires or obtains a default or breach upon the part of the obligee, there is no place to stop.

It has always seemed to us that this case required a decision upon two questions: First, whether this provision of the contract created a valid condition; second, if so, can a plaintiff recover without pleading and proving a compliance with it. These questions are not answered by the statement that it was a part of the duties of the contractor and that the contract being performed it will be presumed that it was lawfully performed and that there is no showing that the Kootenai

River is navigable, because no matter whose duty it was to comply with this provision in the first instance, the County certainly must be said to have taken this contract knowingly with this condition in it, and in the absence of allegations and proof it cannot contend that the contractor by fraud or imposition procured its acquiescence in the evasion of this provision. And next, as to the presumption that the permission was obtained because the contract was performed. Now, as a matter of fact there is nothing upon which to base a conclusion that the contract was lawfully performed. The construction of the bridge is one thing, and the performance of this contract another thing, and all that is shown by the record is that the bridge was constructed. Moreover, this very opinion itself holds that this bridge could have been constructed legally without obtaining the approval of any plans and specifications because there is no presumption of navigability and that no navigability is shown. The use of the two presumptions; that is, the one to the effect that the river is not navigable, and the other that the bridge was lawfully constructed, neutralizes and renders of no effect and inapplicable each of the presumptions.

If you strip this case down to its bare facts, you find a contract containing a condition precedent with no allegation of performance of it and with no proof of performance of it. It will not

do to answer this state of facts by saying that the trial judge held "that he considered the complaint amended to conform to the proof" for the obvious reason that there is no proof upon the question and if amended to conform to the proof the complaint will be just as silent as before the proof was written into it. Nothing is gained for the plaintiff from the fact that in the contract of February 5, 1912 (p. 8, transcript), the provision in question is not rewritten. A fair reading of the February 5th contract convinces that it is not presumed to be complete within itself because it contains no provision as to payment except by payment in addition to the original contract, contains no agreement as to the furnishing of any bond, contains no provision with regard to payment for trestle, additional concrete, contains no time of performance and does not provide who is to furnish the materials, etc., etc. In the opinion some mention is made of the fact that the answer does not affirmatively plead failure to obtain the approval of the plans and specifications. If this provision is valuable at all, it is that it is a condition precedent. There should be no uncertainty as to whether these provisions create a condition precedent. They distinctly, definitely and without equivocation state "that this contract shall not take effect," etc. For illustration, suppose that this contract had been executed, the bond given, no plans or

specifications approved by the War Department, and the contractor did nothing. Could a suit then be brought upon this contract against the surety? Manifestly not. If not, then what has changed the surety's rights? It cannot be that this Court is going to place the rights of the surety entirely in the hands of the principal in the bond. It is contrary to all theories of the law. There is no legal principle which can enlarge the obligations contained in the surety's contract. To hold the surety liable in this case because the bridge was actually erected not only places the Surety Company entirely in the hands of the principal, but it goes further and places the Surety's obligations in the hands of the obligee because obviously the Surety would not be liable under the reasoning of the opinion if the bridge had not been built, and the bridge was actually built by the Bridge Company with the concurrence of the County in such a way as that the bridge fell down.

It seems to us that presumptions having their basis on the fact that the work was constructed are entirely foreign to the determination of the contract obligations of the Surety. The Surety took no part in any construction. The Surety's contract provided that it was liable only if the plans and specifications were such as to gain the approval of the War Department. The intent as expressed in this provision and the words as ex-

pressed comply in every detail with the definition of conditions precedent.

In 4 Encyclopedae Pleading and Practice 627, it is said:

“A condition precedent calls for the performance of some act, or the happening of some event, after the terms of the contract have been agreed upon, before the contract shall take effect; that is to say, the contract is made in form but does not become operative as a contract until some thing or act is performed before some subsequent event occurs.”

And (p. 629):

“The performance of a condition precedent to be executed by one other than the plaintiff must likewise be averred.”

Apply these conceded rules to the case at bar. Here you have a surety upon a contract, which by its express terms is not to become effective until the plans and specifications have been approved. Plaintiff sues and absolutely ignores this condition, does not mention it, and when he comes to trial offers no proof concerning it. The fact that the Surety agreed to the contract containing this provision precludes any inquiry as to whether the Surety would have become bound in an agreement where the contractor was to be unrestrained and for a lump sum to put up such a bridge as the Bridge Company thought expedient. It is beside

the point to say that the engineers of the government might have allowed this particular bridge to have been built in a manner which would allow it to fall and obstruct the stream. Whether they would or not is not the inquiry. The inquiry is and it must be, whether the plaintiff has shown that a bridge built under plans and specifications approved by the War Department has collapsed to the damage of the plaintiff?

We could pile up authorities without limit to the effect that the words of this contract make it operative only when the specified event happens and to the effect that one who seeks to recover upon a contract must bring himself within it by pleading performance upon his own part and breach on the part of the other. No one disputes these principles and no one ever has in this case, but it does seem to us that the opinion does not meet these contentions and that the contentions are directly based upon the record.

ANTICIPATED PAYMENTS

In the opinion in the case it is held that under the law the Surety Company is required to show injury arising from the anticipated payments because of the fact that it is a compensated surety.

In *Prairie State Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, the following with regard to retaining payments is quoted with approval:

“And the effect of this stipulation was at

the same time to urge Streather to perform the work and to leave in the hands of the company a fund wherewith to complete work if he did not and thus it materially tended to protect the surety."

Note that the advantages of the surety are two-fold: First, that the retained percentage acts as a pressure upon the contractor to hold him in line and to properly perform, and second, to provide a fund in the event that the contractor does not perform. In this same case the Supreme Court of the United States quotes with approval the following:

"The principle is, the withdrawal of the fund agreed upon as security for the performance of the contract without his consent is a prejudice to the surety of guarantor."

All of the decisions in point recognize this two-fold purpose of the withholding of payments, and it is equally well established that the withdrawal of this fund by its payment prematurely to the contractor of itself prejudices the Surety; and this must be true because if you remove the pressure on the contractor to honestly carry out his work, you certainly thereby increase the risk of his surety. We venture the assertion that no case exists in the United States except this one in which any court has held that the surety was not released by substantial anticipated payments. It is true that

some authorities have held that a compensated surety must show injury, but all authorities to this date have agreed that the advance payments of itself is injury. If it be the law that a surety in addition to the conceded fact that the pressure is removed upon a contractor to honestly perform, must show that the contractor would have honestly performed if the payments had been withheld, then the surety must always pay no matter what the obligee does as to advance payment, if it be a case in which the work was carelessly performed. Of course, as to cases where the contractor fails entirely to perform and the surety must take up his labors, the difference in the amount of money on hand and what would have been on hand if the percentage had been retained will physically demonstrate the amount of damage to the surety; but in a case in which overpayments had been made to the contractor and the contractor has been careless in his work so that the structure falls, it must be apparent to everybody that the only way a surety can show further injury than the withdrawal of the pressure would be to prove that the contractor would not have been negligent if the pressure of his retained money had remained. Of course, everybody knows that a contractor who has not been paid feels a greater interest and stays more upon the work than a man who has all of his money and who has the unpleasant task of yet earning it in the future.

There is a distinction to be had in the authorities which we are trying to urge upon Your Honors to the effect that even if the compensated surety must show injury, still that he has shown it whenever the fact of substantial over-payment appears.

For the purpose of showing the flagrant violations of the duty of the County in this case, let us turn for a moment to the resolution which shows the spirit in which this payment was made. The resolution authorizing the anticipated payments itself recognizes that the County is shifting the burden from the contractor to the contractor's bondsman. It says (p. 89, Transcript):

“Whereas the Coast Bridge Company has furnished good and sufficient bonds in the sum of \$65,000.00 with the National Surety Company of New York, as surety conditioned for the performance of the terms and conditions of each of said contracts,”

What did the County have in mind when they passed that resolution? They are merely saying that while we have a right to hold the contractor in line and make him honestly perform by retaining his money, still we waive that right because if our judgment is wrong and the contractor does not honestly perform, then we will make his bondsman pay. Let it be accepted as the law, for the sake of argument, that the surety must show

an injury and increase of his risk. Can anybody fairly contend that this resolution does not deliberately withdraw the security fixed by the contract and place an additional burden upon the surety? And this established, the plaintiff contends that the contractor did not carry out the contract carefully but was careless. In other words, the very thing happened, according to the County, which the County anticipated when in its resolution it recited that it had a bond.

Although we have conceded to this point that it is established as the law that a compensated surety is not entitled to the benefit of the rule of *strictissimi juris*, we strongly contend that as yet the contrary is the law and that this Court is required to overrule the Supreme Court of the United States in holding an opposite view.

Let us consider the cases on the question:

Williams v. Pacific Sureties Company, 77 Ore. 210, 149 Pac. 524, involved a failure to complete a logging contract; no question of advanced payments in it. The case squarely holds that a compensated surety must show injury. **Leiter v. Dwyer Plumbing Co.**, 66 Ore. 474, 133 Pac. 1180, involved the total abandonment on the part of a subcontractor to do plumbing; no question of payments in it. The author of this petition wrote the brief on behalf of Leiter in that case and hence knows that it does squarely hold that a compensated surety must show damage. **Manhattan Com-**

pany v. United States Fidelity & Guaranty Company, 77 Wash. 405, 137 Pac. 1003, appears to involve over-payments to contractor, but it develops that the payments were not made to the contractor but were made to workmen whom the contractor had employed and for the purpose of preventing the filing of a lien. Also, although the payments made to the contractor exceed by \$100.00 the contract rates, still \$115.00 of extra work had been done. The case cites with approval a previous case in Washington to the effect that an advanced payment of \$3500.00 upon a total contract of \$16,500.00 would release the surety. In the case at bar it is a fact and the opinion recites:

“One-half of the contract price was paid in advance of the arrival of any of the materials or the performance of any work.”

The contract provides (p. 64, Abstract) for a total payment of \$24,252.00 and the first 25 per cent thereof upon the completion of the concrete piers. Under the established law in Washington this would release the surety.

This disposes of all the State Court decisions urged as supporting the opinion.

In **Lonergan v. San Antonio Trust Company**, 101 Tex. 63, Washington cases are discussed and the Texas Supreme Court refuses to follow them. It is said:

“How it could be that receiving compensa-

tion by the surety would affect the relation between the surety on the bond and the owner of the building has not been suggested by counsel, and is not apparent to us."

No distinction as to compensated surety has been made in many States.

Alcatraz v. United States Fidelity & Guaranty Co., —Cal.—, 85 Pac. 156.

Norwegian v. United States Fidelity & Guaranty Co., 83 Minn. 269, 86 N. W. 330.

Burns Estate v. Fidelity & Deposit Co., —Mo.—, 70 S. W. 518.

House v. American Surety Co., —Tex.—, 54 S. W. 303.

The cases in the Federal Courts, in our humble judgment, do not sustain the opinion in this case but on the contrary leave the old rule in force as to cases like the one at bar.

In **Atlantic Trust & Deposit Co. v. Town of Laurinburg**, 163 Fed. 690, the Circuit Court of Appeals of 4th Circuit decides a case of anticipated payments exactly as the one in the case at bar. As far as we have been able to learn this is the only case where a Federal Court has held that anticipated payments does not in and of itself show damage to the surety. It is based upon **United States Fidelity & Guaranty Co. v. U. S.**, 191 U. S. 416, 48 L. Ed. 242, and it rests upon the erroneous assumption that the Supreme Court in that case departed

from the established rules with regard to sureties. A reference to the basic case shows that what the Supreme Court of the United States actually decided was that in a contract given nominally to the Government but really for the benefit of third persons and covering an indefinite obligation would not be construed as strict as bonds given for the indemnity of the obligee. It is true that in the opinion it is said (of the rule of **strictissimi juris**):

“It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor.”

The case involved an extension of time granted by a person furnishing materials to the contractor. The extension was granted for sixty days. This the Court held not to be an unreasonable time and to really be within the time which the Surety Company should have contemplated when it gave the bond. The opinion then says:

“Such a contract should be interpreted liberally in favor of the sub-contractor with a view of furthering the beneficent object of the statute.”

This quotation gives the essence of what the Supreme Court decided, and they squarely base

their holding upon a particular statute under which the bond was given. The opinion justifies the statement that it is intended therein to denote a clear distinction as to the law which would be applied in the event that the bond had been an indemnity for the United States, and for definite obligations. It is also said in the opinion:

“In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. If he becomes surety for the performance of a building contract, he is presumed to know the parties, the terms of their undertaking, the extent and feasibility of the work to be done, the character and responsibility of the principal obligor, and his ability to carry out the contract.”

This clearly shows that the Court is not changing the law with regard to sureties for compensation upon construction contracts. The fact that the Supreme Court of the United States is not changing the law is conclusively shown by the following quotation from the opinion:

“Counsel for the brick company argued with much persuasiveness that this rule of **strictissimi juris**, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the

guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

It is apparent that the Court here expressly says that it is open to doubt whether there should be any relaxation of the rule as between the obligee and the guarantor because of the fact of compensation of the surety. This statement is inconsistent with the claim that the Court did intend to make such a change in the law in that opinion. The Supreme Court, it seems to us, in the following quotation expressly limited the decision to bonds given to cover uncertain obligations which may later occur in favor of third parties, that is:

"The question involved is whether the ordinary rule that exonerates the guarantor in case the time fixed for the performance of the contract by the principal be extended applies

to a bond of this kind, executed by a guaranty company not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties.”

That the Supreme Court of the United States does not understand that it has relaxed the rule in any cases other than where bonds were given in pursuance of the statutes for the benefit of the third parties, is definitely shown in the very late case of **Equitable Surety Co. v. United States of America, to the use of W. McMillan & Son**, 234 U. S. 448, 58 L. Ed. 1394. The case involved an action against a compensated surety to recover for work and labor furnished by third persons. It is held in the opinion that changes made by the Government will not work a release of the surety so far as claims in favor of third persons are concerned. It is expressly stated, however, that as to the Government a distinction exists and any departure had from the terms of the contract will release the surety even though the change “be beneficial to the principal obligor.” It is there said:

“The rule that obtains in ordinary cases is that any change in the contract made between the principals without the consent of the surety discharges the obligation of the latter, even though the change be beneficial to the principal obligor.

But it lies at the foundation of this rule of **strictissimi juris** that the agreement altering the undertaking of the principal must be participated in by the obligee or creditor, in order that it may have the effect of discharging the surety. This is expressed or implied in all the cases. *Miller v. Stewart*, 9 Wheat, 680, 703, 708, 709, 6 L. ed. 189, 195-197; *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201, 208, 10 L. ed. 419, 422; *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 93, 98, 23 L. ed. 699, 700; *Union Mut. Ins. Co. v. Hanford*, 143 U. S. 187, 191, 36 L. ed. 118, 120, 12 Sup. Ct. Rep. 437; *Prairie State Nat. Bank v. United States*, 164 U. S. 227, 233, 41 L. ed. 412, 416, 17 Sup. Ct. Rep. 142; *United States v. Freel*, 186 U. S. 309, 310, 317, 46 L. ed. 1177, 1178, 1181, 22 Sup. Ct. Rep. 875.

In the case of a bond given under a statute such as the act of February 28, 1899, there is no single obligee or creditor. The surety is charged with notice that he is entering into what is, in a very proper sense, a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere trustee, and therefore incapable, upon general principles of equity, of bartering away, for its own benefit or convenience, the rights of the benefi-

ciaries. In the light of the statute, the surety becomes bound for the performance of the work by the principal in accordance with the stipulations of the contract, and for the prompt payment of the sums due to all persons supplying labor and material in the prosecution of the work provided for in the contract.

What would be the result of a change not contemplated in the original contract, as between the District of Columbia, consenting to the change, and the surety company, not consenting thereto, is a question not now before us, and respecting which we express no opinion."

While this opinion refers to changes made by the Government, yet the rule which it affirms as being the law indicates very clearly that it is the opinion of the Supreme Court that it has not yet given any basis for a Federal Court to hold that the Supreme Court has made a distinction between non-compensated and compensated sureties except as applied to a bond given for the protection of third persons. It also to us indicates very clearly that the Supreme Court of the United States in rendering this decision were fully cognizant of the contention that a change should be made in the law as to compensated sureties. It is likewise just as clear to us that the Court in this opinion is in-

dicating that when that question is presented to the Court that it is considered very doubtful that the Court will decide to change the law. A reading of the report of the case shows that the authorities where it is claimed the distinction is made were in a large part before the Court and with that situation the Court says that the rule in ordinary cases is that any change even though beneficial to the surety's principal releases the surety. With this view of the law in the Supreme Court of the United States, the decision by the Court of Appeals of the Fourth Circuit in the Atlantic Trust-Laurinburg case is robbed of its support in Federal law and it stands alone and as we shall attempt to show in this brief in conflict with the weight of authority.

All of the other cases in Federal courts put forth as sustaining that a change has been made in the law, are from Pennsylvania with the exception of *Guaranty Company v. Pressed Brick Co.*, 191 U. S. 416. That case is the same one which has been referred to as the basis of the Atlantic Trust-Laurinburg case and we make no further comment upon it.

Let us now take up the Federal cases from Pennsylvania. The first one was **Baglin v. Title Guarantee & Surety Co.**, 166 Fed. 356, affirmed, 178 Fed. 682. At the outset it should be carefully noted that it is not a construction case at all but

involved the return of certain securities. That part of the decision which treats of compensated sureties is purely dictum, and it is said of the contention with regard to a claimed extension of time (166 Fed. p. 363):

“Whatever force might be allowed to this contention, if the defendant had guaranteed the payment of the note—a point that does not need consideration now—I think no weight should be given it, if I am right in the construction I have put upon the defendant’s obligation.”

The dictum is then based upon the Guaranty Co. v. Pressed Brick Co. in 191 U. S., and the decision of the Fourth Circuit in Atlantic Trust v. Laurinburg, both of which cases give no support to the doctrine that the law has been changed in Federal jurisdiction according to our analysis of them. The Atlantic Trust-Laurinburg case is based upon the Guaranty Co.-Pressed Brick case, and the Guaranty Co.-Pressed Brick case does not hold what the Atlantic Trust Co.-Laurinburg case claims for it. The decision in the Baglin-Title Guarantee case upon appeal to the Circuit Court of Appeals does not sustain the dictum of the Court below because in the entire opinion the Circuit Court of Appeals very carefully refrains from placing any part of their decision upon the ground of a change in the law as to compensated

sureties. The Baglin-Title Guaranty & Surety Co. cases, that is in the court below and upon appeal are not authority in this case for the reason: First, that they did not involve the removal of the pressure upon the contractor engaged in construction by anticipated payments; second, any reference to a change in the law by the lower court is dictum and based upon an erroneous conception of the Guaranty Company-Pressed Brick decision in the United States Supreme Court; third, the Circuit Court of Appeals very carefully strips the decision of any holding upon the question of compensated sureties.

In the case of **Justice v. Empire State Surety Co., 209 Fed. 105**, Judge Thompson, sitting in the District Court of the Eastern District of Pennsylvania, judicially determines that the Trust Co. v. Baglin cases and the Guaranty Co. v. Pressed Brick Co. case do not change the rule as applied to anticipated payments made to a construction contractor. The case involves squarely the question of whether or not by anticipated payments the surety was released and after a citation and analysis of the cases, Judge Thompson says:

“After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of **strictissimi juris** was extended as between the surety and the obligee in the bond to the extent of requiring proof of actual injury in the case

of breach of the terms of the bond by anticipation of payments by the obligee to the contractor. In such case, for the reasons stated in *Prairie State Bank v. United States* and *Fidelity Co. v. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance from the terms of the contract."

We urge upon Your Honors that Judge Thompson's decision states the law. Concededly there have been cases which hold that damage must be shown in order that a compensated surety may be relieved but the theory of all the cases is that an anticipation of payments by the obligee as a matter of law shows damage. It might be that where the anticipated payment was very small that the Court would not be justified as a matter of law in holding this, but where as in the case at bar, the payment before any work is commenced at all is substantially half of the total contract price and before the piers are completed substantially half of the remainder, and the contract providing that no payment be made until the piers are completed, it seems to us that no Court should hesitate in saying that as a matter of law the pressure upon the contractor to carry out his contract is dissipated and the surety is thereby injured.

Another Pennsylvania Federal case urged as supporting the opinion is **United States Fidelity &**

Guaranty Co. v. United States, 178 Fed. 692. This decision is likewise prior to Judge Thompson's analysis of the authorities contained in the 209 Federal. The case is also distinguishable at a mere glance at the syllabus, as it appears to be a case brought to recover for labor and materials furnished, upon a bond given for the benefit of third persons under the statute considered in *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. A distinction as to the *Guaranty Co.-Pressed Brick Co.* case also distinguishes this case. The *Justice-Empire State Surety* case was reviewed by the Circuit Court of Appeals of the Third Circuit and is reported in 218 Fed. 802. It is there upon that appeal directly held that the anticipation of payments, although only in the sum of \$2,000.00 as against a contract price of \$11,700.00, released the surety; and the case of *Prairie State Bank v. United States*, 164 U. S. 233, 41 L. ed. 412, is cited with approval, and also with approval from the *Prairie State Bank v. United States* case is taken the quotation from *Holme v. Brunskill*, 3 Q. B. D. 495, as follows:

“ * * * * * That if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by

the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that, if he has not so consented, he will be discharged."

The opinion certainly takes from the Baglin-Title Guaranty cases and as well as all cases previous to its date any claim of support for the doctrine that anticipated payments do not of themselves release the surety. It is squarely so held in the following language:

"Moreover, the advancements are so large and substantial that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety, if such showing should be deemed important. There was, therefore, nothing to leave to the jury, and we think the judge below was right in giving binding instructions, and holding, as he did, that:

'For the reasons stated in *Prairie State Bank v. United States and Fidelity Co. v. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variation from the terms of the contract.'

In **Wells v. National Surety Co.**, 222 Fed. 8, the Circuit Court of Appeals of the Third Circuit approved the Justice-Empire State case and again held under date of April 17, 1915, that anticipated payments made to a contractor released the compensated surety, and it is said:

“Having acquired \$4,000 by this means before any payments were due under the contract, and having performed work under the contract for which it thereafter received but \$875 out of a contract price of \$11,847, the Contracting Company quit work on May 4th, leaving the principal contractor to complete its work and the defendant Surety Company to pay for it. May it not be said that, when the subcontractor became possessed of \$4,000 in advance of work done and payments due, he lost an incentive to continue, and the Surety Company was deprived of the protection which such incentive normally assures?”

Your Honors will note that again the loss of incentive to continue is as a matter of law held to be an injury to the surety. It seems to us that there should be no hesitancy in declaring that the removal of the incentive to the contractor to honestly and faithfully and diligently perform by paying him as much as he will receive no matter what he does works an injury upon the surety. As far as the contractor is concerned, where his payments

are anticipated, he will get the same amount of money if he carelessly and indifferently performs as if he carefully and diligently performs.

The remaining Federal case urged in support of the opinion, that of **American Bonding Co. v. United States**, 233 Fed. 364, is from the Third Circuit. It like the Guaranty Co.-Pressed Brick Co. case was by one who furnished services and material and the suit was upon a bond given in pursuance of the Federal statute. This would distinguish it as to any case having application here. The case, however, does hold that the anticipated payments of themselves released the surety. It is said in the opinion:

“We need scarcely discuss the proposition that such a course of dealing materially changed the terms of payment originally agreed upon and guaranteed. These terms were not observed at all, and it is not sufficient to reply that Wells was hampered by insufficient capital, and by the fact that he was carrying on other contracts at the same time and was compelled to use the money for other purposes. Neither is the reply sufficient that the Marble Company could not induce Wells to pay in accordance with the subcontract, and was therefore obliged to accept the notes and such money as it could get, because this was the best way out of the diffi-

culty. The company certainly owed some duty to the surety. It was not obliged to go on with a contract that Wells from the first was refusing to carry out, and if it chose to do so, and to take its chance of getting out whole, it must stand by the risk it deliberately undertook. We do not know whether the Bonding Company knew the terms of the agreement between Wells and the Marble Company; but in any event it does not appear to have had knowledge of what the parties to the agreement were actually doing, and it had a clear right to rest on the assumption that (whatever the terms of payment might be under the subcontract) they would be lived up to without material change, and without injury to itself. In brief, a corporate surety under the act of 1905 is much like the signer of a blank check. Undoubtedly such a man takes a risk; if a larger sum should be inserted than he intended, he must usually accept the situation; but, after the blank has been filled, his liability is fixed, and is not subject to injurious change thereafter."

The case, far from being an authority to the effect that anticipated payments will not release the surety, argues directly that such payments constitute an injury and damage to the surety. The case also argues that one making the advanced

payments thereby assumes a risk by the removal of pressure on the contractor and that that risk cannot be made to fall upon the surety. While the case is not in point in view of the fact that the bond was given for the payment of uncertain obligations to third parties, still so far as it is applicable it seems to us to argue directly that the making of anticipated payments of itself results in an injury to the surety. It is true in the case that the amount of funds retained had a direct bearing on the amount which the surety was to pay, but remembering that the purpose of the retaining payments was two-fold: First, to keep pressure on the contractor that he will honestly perform; second, to indemnify the surety in the event that he failed to perform, there is and should be no distinction in principle where the contractor fails to perform and where he negligently performs. In any event his conduct is directly participated in by the obligee by the removal of the pressure calculated to hold him in line.

This concludes the discussion upon the Federal cases supporting the opinion, and it is seen that the decision in the Fourth Circuit, which still stands, is based upon the Guaranty Co.-Pressed Brick decision in the United States Supreme Court, and that the Guaranty Co.-Pressed Brick case does not establish any change in the law as to anticipated payments on the part of the Supreme Court of the United States; and so far as the other Federal

cases are concerned all arising in Pennsylvania, it is established to be the settled law in Pennsylvania that an anticipated payment made to a contractor releases the surety where the bond is given not for the benefit of third persons but directly to the owner of the structure.

Another principle which we take it must be said to be established by the authorities is that no matter if the surety is required to show damage that he shows it as a matter of law when he shows that by the anticipated payments the pressure on the contractor has been removed. This conclusion renders unnecessary an analysis of the statutes of Montana because it is conceded that under these statutes all that need be shown is that the surety be damaged. Now, if the anticipated payments as a matter of law shows damage to the surety then under the Montana statutes the surety is discharged. However, an analysis of the Montana statutes gets to the same place. In the opinion it is said:

“We think, however, that the second and third sections of section 5686 are controlling and that such is the effect of the decision of the Supreme Court of Montana in the case above cited.”

In accordance with the view of the Court as to the sections applicable, we call attention to the language of those sections. They are:

“A surety is exonerated:

1. * * * *

2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or

3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

Of these two sections number 2 must be the one which is applied, and under that section nothing is said about any indemnity. The feature of indemnity we will discuss a little later in this brief, but under this subdivision 2 the language leaves no room for any intention of a condition with regard to indemnity. Section numbered 1 is complete and section numbered 2 is likewise complete within itself so that the surety is exonerated if any act of the creditor naturally proves injurious to his rights or is inconsistent with his rights. Applying the rule of the cases to the effect that anticipated payments removes the pressure upon the contractor to cause him to diligently perform and is an injury to the surety, the answer is plain because it is then shown that the creditor, to wit, the County, has been guilty of acts inconsistent with the rights of the Surety, which are injurious to the Surety. The effect of these acts can logically be found only by taking what actually happens and you find that the contractor, according to the conten-

tion of the County, was negligent, and you find that his negligence occurred after the County had removed from him the stimulus and incentive to honestly perform by paying him all he would receive in any event. This being true and it being impossible to prove what the contractor would have done if the inducement to faithfully perform had not been removed, it would seem to be established that injury was as well shown as it could be in any case and to be a sufficient showing to release the Surety under the laws of Montana. While under this section of the statute a question of indemnity is not involved, yet because there is a reference to an offer of proof made upon the trial and to a letter which was introduced, we wish to challenge Your Honors' attention to the fact that this letter will not sustain a contention, if construed most strongly against the company, of anything beyond the fact that the Coast Bridge Company is bound to indemnify National Surety Company. That is what the letter says and obviously all it means. This leaves the matter exactly where it would be if the letter had not been written because it is the law that a principal must indemnify a surety if the surety is compelled to pay a loss because of defaults on the part of the principal. With regard to the offer of proof. The offer is to prove that Coast Bridge Company has agreed to indemnify National Surety Company. Proof of that kind is clearly incompetent and goes to a fact

about which there can be no dispute. The law undoubtedly is, without regard to any statute, that the principal is liable to the surety and must indemnify the surety. In addition, Section 5690 of revised codes of Montana for 1907 provides:

“If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.”

The next section provides for the subrogation of the surety to the rights of the obligee. The law is perfectly clear under the statutes of Montana that a surety indemnified only by his principal is released by an act of the creditor injurious to the surety. That offer of proof carried with it nothing beyond that which was contemplated by the statutes and the law and which did not change either the statutes or the decisions.

There should be no confusion with regard to section 5673 of the Codes of Montana, because in the first place it cannot be read into subdivision numbered 2 of section 5686, and furthermore section 5673 contemplates as indemnity something more than the mere liability of the principal in the

bond to indemnify the surety, because otherwise the section 5673 is meaningless, as under the law the principal always is bound to indemnify the surety. A reading of the Codes of Montana as to guarantors and sureties will convince that the indemnity which will prevent the release of a guarantor must be something more than the mere indemnity furnished by the relation of principal to surety. However, it seems to us that the application of subdivision 2 of section 5686 eliminates in this case any question of indemnity.

CHANGE OF CENTER PIER

With regard to the change of the center pier. What we claim for this is that it shows that in this very important particular the bridge as constructed was not constructed according to plans and specifications previously approved by the War Department. Heretofore in this petition we discussed this provision of the contract and the fact that there was no allegation or proof on the part of the plaintiff of a compliance therewith, but with regard to the construction of this center pier and the place of its location the record shows (p. 105, transcript) that when this pier was moved that there was no change made in the plan which demonstrates that there was no approval of the location of this pier on the part of the engineers of the War Department because if the plan was not changed, manifestly the plan as changed could not

be put up to the War Department. Bear in mind that the original contract provided that it should not become operative until the plans and specifications had been approved by the War Department. It seems to us that this testimony with regard to the change of the center pier demonstrates not only that the plan in this regard was not put up to the War Department but that the pier was placed in a more dangerous position than the plans originally drawn and if the presumption is to be indulged that the original plans were approved by the War Department, then it is shown that the County knowingly allowed the construction of this important part of the bridge contrary to the plans approved by the War Department. This testimony standing admitted in the record is entirely competent under the general denials of the answer because the burden of proving a compliance with the contract is upon the plaintiff. No special allegation was necessary in order for the defendant to show that the bridge had been constructed without the approval of the War Department and here is a particular in which it is demonstrated that this actually occurred. Moreover according to the testimony of McClayn, which is undisputed, this center pier was placed where the water would have a bigger sweep at it than as shown by the plan. This fact was set out in the opinion. If the water swirling around had a bigger sweep at the pier, this must be said to establish a location where it would

be more difficult for the pier not only to be constructed but to remain. The claim of the County here is that the water undermined the pier. Now, if the pier was placed where there was a bigger sweep of the water, it seems to us that everybody must concede that the bigger the sweep the more damage the water would do, so that you have a situation in which the plan for the pier, which is a very important part of the bridge, could not have been approved and where the pier which actually went out was placed in a more dangerous position than shown by any plan which could have been approved. It is said in the opinion in this case that the failure might have been made at the instance of the contractor. We contend that it would make no difference who urged the program for the removal of the protections to the Surety—that the Surety Company had a contract which rendered it liable only for work done in pursuance of plans previously approved by the War Department, and if the County knowingly accepted in performance of this contract work which was performed not in accordance with a plan previously prepared, that the accepted work which under the plain English language written in our contract cannot be said to be within the contract which we guaranteed. It is also said in the opinion that the lower court may have found that the change as to the center pier was an alteration permissible under

the terms of the contract. We contend that what the lower court may or may not have found would not in any wise bind this court, as we are applying to this court for the purpose of having the law correctly applied to the record, and what alterations are permissible under this contract is purely a question of law, where the alteration made is indisputably established. However, we do not urge the alteration as being one which of itself would work a release so much as we urge that it demonstrates that the County knowingly allowed the construction of a bridge which was not within any plans and specifications previously approved by the War Department.

CONCLUSION

There are other respects in which our humble judgment will not allow us to view the law to be as it is set out in this opinion, but in those respects we defer to the superior knowledge of Your Honors, and we urge the foregoing only because we are so convinced of them as that we think Your Honors could in justice allow us to be heard further upon them. The contention with regard to the approval of the plans and specifications involves no new principle of law and under the authorities we cannot convince ourselves but that plaintiff must plead and prove a compliance with this contract in order to make a case.

With regard to the payments which are devel-

oped by the plaintiff's case to have been made out of order. We have been unable to find a single authority which has gone so far as the opinion in this case goes, and such law as we have been able to find is directly contrary to the position taken in the opinion. We make bold to suggest to Your Honors that if there is to be a change in the Federal jurisdiction of the law with regard to the anticipation of payments that the Supreme Court of the United States take the responsibility of making it. The Supreme Court of the United States when it decided the *Equitable Surety v. United States* case on June 8, 1914, knew about the tendency of some of the courts to relax the rule of **strictissimi juris**, but the Supreme Court of the United States in that case advisedly states the rule and makes no relaxation as to a compensated surety. No opinion of any Circuit Court of Appeals, which we have been able to find, has carried the doctrine announced in the case at bar, and no other opinion of a Circuit Court of Appeals, that we have been able to find, supports it.

A reversal of this case would not necessarily mean that plaintiff could not eventually recover. The plaintiff has a cause of action against the Bridge Company and another against the Surety Company if the facts be as the plaintiff claims. The plaintiff advisedly elected to prosecute an action solely against the Surety Company. The plaintiff

iff should not be allowed to prosecute an action solely against the Surety Company and have applied the rules of law which would apply if the action was against the Bridge Company. In other words, the plaintiff can yet, if it is so advised, maintain an action against the Bridge Company if it be that the County honestly believes that the Bridge Company is able to indemnify the Surety Company, because if the Bridge Company is financially able to indemnify the Surety Company, then, of course, it is financially able to pay a judgment which the County might obtain against it.

We respectfully submit to Your Honors that a rehearing should be granted in the case, and if the state of the law is as we contend for it that either the case should be reversed, or the Supreme Court of the United States on certificate or by writ of certiorari allowed to settle the law upon the question.

Respectfully submitted,

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Dated January 24, 1917.

No. 2829

United States Circuit
Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, Owner and
Claimant of the Steamship "Seward,"
Appellant,

vs.

ARTHUR J. GILBERT,
Appellee.

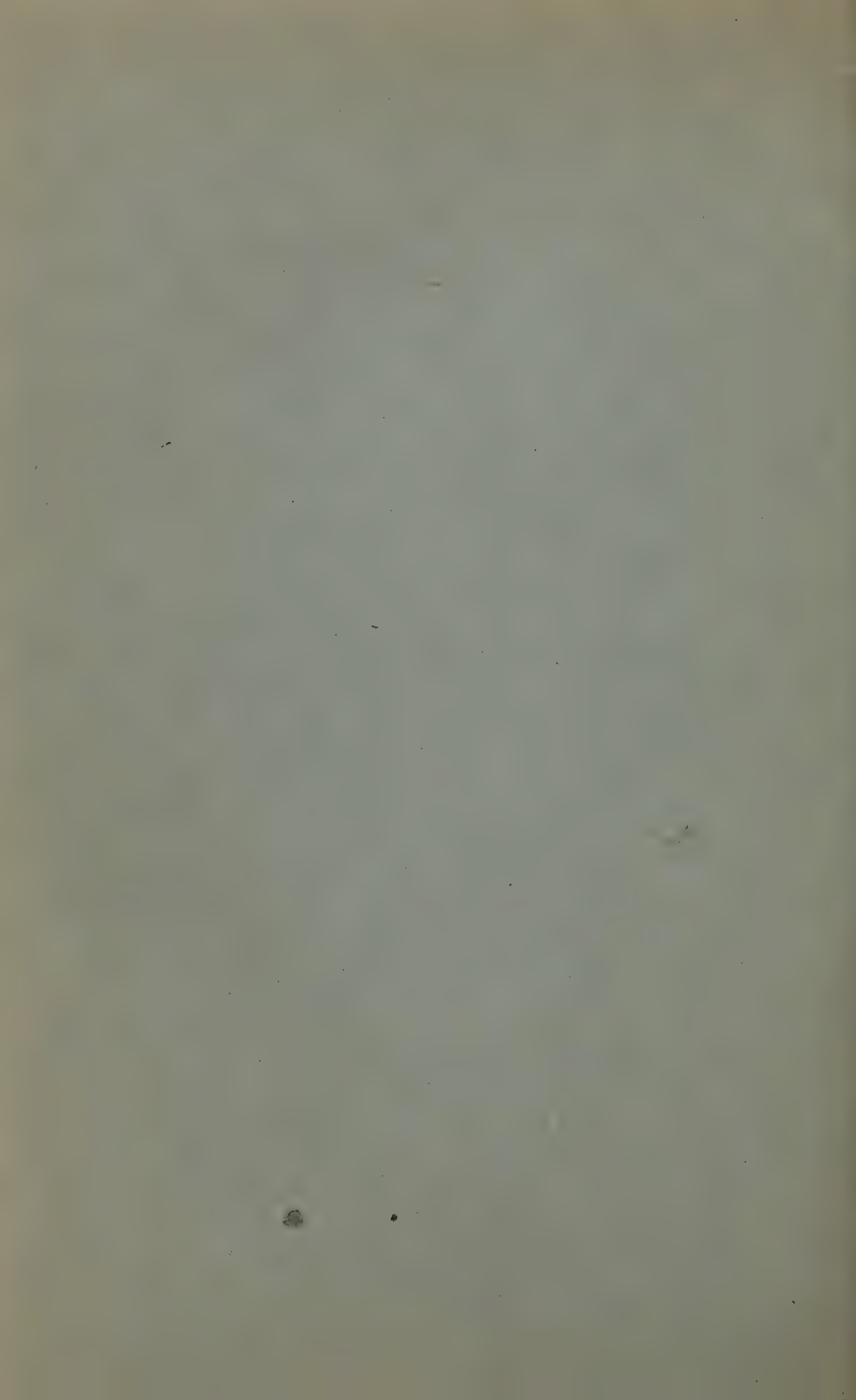
APOSTLES ON APPEAL

From the United States District Court for the Western
Division of Washington, Northern
Division

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

Filed

JUL 15 1916



No.

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609-616 Central Building, Seattle, Washington.

Proctors for Alaska Steamship Company,
Claimant and Appellant.

EIMON L. WIENIR, ESQUIRE,
1011-1017 American Bank Building,
Seattle, Washington.

Proctor for Arthur J. Gilbert,
Libelant and Appellee.

NO. 3164-A
IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION
IN ADMIRALTY

ARTHUR J. GILBERT, *Libellant*,

vs.

S. S. SEWARD, *Respondent*,

ALASKA STEAMSHIP COMPANY, a Corporation,
Claimant.

STATEMENT

This suit was commenced on November 15, 1915. The names of the parties herein are Arthur J. Gilbert, Libellant, and Alaska Steamship Company, a corporation, Claimant. The libel was filed on November 15, 1915, and the claim and answer of the Alaska Steamship Company on December 3, 1915. On November 15, 1915, upon the filing of the libel, a monition issued under the seal of the District Court of the United States for the Western District of Washington, directed to the marshal of said court, and was, on the 18th day of November, 1915, returned by the said marshal into the office of the Clerk of said court, and served, on November 15, 1915, on C. A. McMasters, Secretary and Treasurer of the Alaska Steamship Company, and S. H. Melrose, Acting Manager of the American Surety Company of New York, principal and surety on the standing bond for the release of vessels of the Alaska Steamship Company on file in said court.

On the 10th day of January, 1916, this cause came on for trial and hearing before the Honorable Jeremiah Neterer, one of the Judges of the District Court of the United States for the Western District of Washington, upon testimony taken by deposition in pursuance of a stipulation entered into between the proctors for the parties herein, and upon testimony of witnesses produced and examined in open

court. Proctors for the respective parties appeared and argued the cause, and thereafter submitted briefs to the court. Thereafter, on February 28, 1916, the Honorable Jeremiah Neterer, before whom the cause was tried and heard, as aforesaid, duly filed his memorandum decision in said cause.

Final decree was made, entered and filed on February 28, 1916.

On March 10, 1916, the cost bill of libellant was taxed and the objections of claimant thereto filed on the same day.

On March 13, 1916, claimant's objections to libellant's cost bill were heard by the court, and on March 20, 1916, the court's memorandum decision was filed, overruling said objections.

Notice of appeal was filed on June 6, 1916.

LIBEL

TO THE HONORABLE JEREMIAH NETERER:

The Libellant, Arthur J. Gilbert, able seaman, against the S. S. SEWARD, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of breach of contract of employment civil and maritime, alleges as follows:

I.

That at all the times herein mentioned the said S. S. SEWARD was and now is an American vessel, and at the time of the filing of the Libel herein was and still is lying in the port of Seattle, and within the District of this Honorable Court.

II.

That this Libellant has a certificate from the United States Government as a able seaman, such certificate being serial number 844.

That on the 22nd day of September, 1915, this libellant was hired by one Frederick W. Robblee, who is first mate on said vessel, and articles of agreement were entered into between the libellant and the master of said ship, J. Johnson, said libellant to serve as able seaman in the capacity of watchman, upon said ship on the voyage from Seattle, Washington, where

the said vessel was then lying, to Anchorage, Alaska, and return to Seattle, leaving Seattle on said voyage on the 25th day of September, 1915, at the rate of wages of Fifty Dollars (\$50.00) per month, and over time allowance of Fifty Cents (50c) per hour.

III.

That libellant entered into the service of said vessel on or about said 22nd day of September, 1915, and performed all duties required of him by his contract of employment and by the first mate and other officers in charge of the vessel, and continued in the performance of his regular duties until said vessel reached the port of Juneau, Alaska.

IV.

That on the 4th day of October, 1915, at said port of Juneau, Alaska, and while this libellant was performing his customary duties on said ship, the first mate above mentioned, without cause, wrongfully discharged libellant from his employment on said ship and forcibly put him ashore.

V.

That by reason of this breach of contract and of such wrongful discharge, this libellant has suffered damages to the amount of Five Hundred Dollars (\$500.00).

VI.

That after the time of his said wrongful discharge on October 4th, 1915, until the termination of his contract of employment with the return of the S. S. SEWARD to the port of Seattle, on November 9th, 1915, this libellant was compelled to expend the sum of Sixteen Dollars (\$16.00) for return passage to Seattle, Washington; and that from the time this libellant was forcibly put ashore from said vessel until the termination of the period covered by his contract of employment, the libellant was compelled to expend the sum of Forty-six and 50/100 Dollars (\$46.50) for board and lodging; and further that this libellant was compelled to expend the sum of Fifty Cents (50c) for carting his baggage to his lodging house; and further, that, after the signing of said

articles and before the sailing of said S. S. Seward from the port of Seattle, Washington, for Anchorage, Alaska, and while libellant was actually in the employ and service of said vessel, he was compelled to expend and did expend the sum of \$1.50 for six (6) meals. That no part of said indebtedness has been paid, and the same is now due and owing to this libellant.

VII.

This libellant is informed and believes, and therefore states the fact to be that the average wages of able seaman earning \$50.00 per month with an allowance of 50c per hour for overtime, on the said S. S. Seward on said voyage, was One Hundred Forty-five Dollars (\$145.00) or thereabouts.

WHEREFORE this libellant prays that process of attachment in due form of law, according to the practice of this Honorable Court in cases of Admiralty and maritime jurisdiction, may issue against the said S. S. Seward, her tackle, apparel and furniture, and that all persons having or claiming to have any right, title, or interest therein may be cited to appear and answer all and singular the matters propounded, and that this Honorable Court may be pleased to pronounce for the damages aforesaid in the sum of \$500.00, for the average of wages received by able seamen on said voyage in the sum of \$145.00, and for the necessary expenses incurred by this libellant because of his wrongful discharge in the sums of \$16.00, \$46.50, 50c, and \$1.50, as above set out, up to the time said vessel reached the port of Seattle, aggregating the sum of \$709.50, together with libellant's costs and attorney's fees herein; and that the said vessel, her tackle, apparel and furniture may be condemned to be sold to pay the same; and that the court may grant to this libellant such other and further relief as shall by law justly appertain.

EIMON L. WIENIR,

Proctor for Libellant.

United States of America, Western District of Washington, Northern District.—ss.

ARTHUR J. GILBERT, being first duly sworn, on oath deposes and says: That he is the libellant above named; and he has read the foregoing libel, knows the contents thereof, and that the statements and allegations therein contained are true.

ARTHUR J. GILBERT.

Subscribed and sworn to before me this 13th day of November, 1915.

J. H. KANE,

Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Libel. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 15, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

CLAIM OF ALASKA STEAMSHIP COMPANY
To the Honorable Judge of the United States District Court for the Western District of Washington, Northern Division:

Comes now the Alaska Steamship Company, owner of the Steamship "Seward," intervening for its interests in said vessel, and makes claim to the said Steamship "Seward," as the same is attached by the United States Marshal under process of this court, at the instance of Arthur J. Gilbert, and the said Alaska Steamship Company avers that it was in possession of the said vessel at the time of the attachment thereof and that it is the true and bona fide owner of the said vessel and that no other person is the owner thereof.

WHEREFORE, it prays to be admitted to defend accordingly.

Dated this 2nd day of December, 1915.

BOGLE, GRAVES, MERRITT & BOGLE.

State of Washington, County of King.—ss.

Before the undersigned Notary Public, W. H. Bogle this day makes oath that he is Second Vice-President of the Alaska Steamship Company, claimant named in the above entitled cause; that he has read

the foregoing plea and claim, knows the contents thereof and that the matters therein stated are true.

W. H. BOGLE.

Subscribed and sworn to before me this 2nd day of December, A. D. 1915.

(Seal)

R. D. SMALLEY.

Notary Public in and for the State of Washington, residing at Seattle.

Service of within Claim this 3d day of Dec., 1915, and receipt of a copy thereof admitted.

EIMON L. WIENIR,

Attorney for Libelant.

Indorsed: Claim of Alaska Steamship Co. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 3, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

ANSWER OF ALASKA STEAMSHIP COMPANY

The answer of the Alaska Steamship Company, owner of the Steamship "Seward," and claimant in the above entitled cause, to the libel filed therein, alleges as follows:

I.

Claimant admits the allegations of Paragraph I of said libel.

II.

Claimant admits that said libelant has a certificate from the United States Government as an able seaman, which certificate was issued subsequent to the 1st day of November, 1915. Claimant further admits that on or about the 22nd day of September, 1915, this libelant was hired and employed by the agents of the claimant and signed shipping articles to work in the capacity of watchman on board the Steamship "Seward" on the voyage to the said port in Alaska and return to the Port of Seattle, leaving Seattle on or about the 25th day of September, 1915, at the rate of wages of Fifty Dollars (\$50.00) per month. Claimant denies that in said shipping articles any agreement or allowance was provided for overtime, but admits and alleges that at the time the said libelant was employed he was a member of the Sailors'

Union of the Pacific and that at said time there was in full force and existence a valid agreement between the Puget Sound Shipping Association, of which this claimant is a member, and the said Sailors' Union of the Pacific, of which the said libelant was a member, which said agreement was binding upon both the libelant and claimant and that the aforesaid employment was subject to and governed by said agreement, and that in said agreement, under certain circumstances therein specified, provision was made for the payment of overtime at the rate of fifty cents per hour.

III.

Claimant admits that libelant entered into the service of the said vessel on or about the 22nd day of September, 1915, but denies that said libelant performed all duties required of him by his contract of employment or by the officers in charge of said vessel, and denies that he continued to perform his regular duties until the said vessel reached the port of Juneau, Alaska.

IV.

Claimant admits that on or about the 4th day of October, 1915, while the said vessel was lying at the Port of Juneau, Alaska, the officers of the said steamship discharged the said libelant from its employ. Claimant denies that the said libelant was performing his customary duties on said ship and denies that he was forcibly put ashore, and claimant expressly alleges that the said libelant was discharged for just cause by reason of his refusal to obey the orders of the officers of the said vessel, which were necessary for the safety of the said vessel and her crew.

V.

Claimant denies each and every allegation in paragraph V of said libel, and the whole thereof.

VI.

Claimant denies each and every allegation in paragraph VI and the whole thereof.

VII.

Claimant denies each and every allegation in paragraph VII, and the whole thereof.

WHEREFORE, claimant having fully answered the allegations of said libel, prays that the same may be dismissed and that it have and recover its costs herein to be taxed, and for such other and further relief as to justice may appertain.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

State of Washington, County of King.—ss.

W. H. Bogle, being first duly sworn, on oath states: That he is Second Vice-President of the Alaska Steamship Company, a corporation, the claimant in the above entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 2nd day of December, 1915.

(Seal)

R. D. SMALLEY,

Notary Public in and for the State of Washington, residing at Seattle.

Service of within Answer this 3d day of Dec., 1915, and receipt of a copy thereof, admitted.

EIMON L. WIENIR,

Attorney for Libelant.

Indorsed: Answer of Alaska Steamship Company. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 3, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between proctors for the respective parties, that the testimony of Oliver Woolhouse, Arthur J. Gilbert, Cezar Curty and P. Bering, may be taken as witnesses on behalf of the Libelant, at the office of Messrs. Bogle, Graves, Merritt & Bogle, Central Building, Seattle, Washington, before Earl E. Richards, a Notary Public in and for the state of Washington, residing at Seattle in said state, on November 23, 1915, at 2 o'clock p. m.; that the depositions of said witnesses, when so taken, may be used on the trial of the above entitled action with the same

force and effect as though said witnesses were personally present and testifying; subject, however, to such objections as may be made at the time of taking such depositions.

And it is hereby further stipulated by and between the parties hereto, that the signatures of said witnesses to such depositions are hereby expressly waived.

EIMON L. WIENIR,

Proctor for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Respondent and Claimant.

BE IT REMEMBERED, that heretofore and on, to-wit, November 23, 1915, pursuant to the attached stipulation, before the undersigned, a notary public in and for the state of Washington, appeared Mr. Eimon Wienir, proctor for Libelant, and Mr. Lawrence Bogle (of Messrs. Bogle, Graves, Merritt & Bogle), proctor for Respondent and Claimant;

WHEREUPON the following proceedings were had:

OLIVER WOOLHOUSE, produced as a witness on behalf of Libelant, and having been first duly sworn by the Notary to tell the truth, the whole truth and nothing but the truth, testified as follows:

Q. (MR. WIENIR). Your name is what?

A. Woolhouse.

Q. State your full name? A. Oliver.

Q. And were you employed by the steamship "Seward?" A. Yes, sir.

Q. On this trip?

A. On last trip, yes, sir; on the same trip he was on, yes.

Q. On the same trip that Arthur Gilbert was employed? A. Yes, sir.

Q. And when did you sail from Seattle?

A. I think it was on the 27th of September.

Q. The 27th of September. And you have known Arthur Gilbert? A. The whole trip.

Q. As far as you know, Mr. Woolhouse, did Mr.

Gilbert do everything that was asked and required of him? A. Yes, sir.

Q. As far as you know, he performed his duties from day to day and from time to time? A. Yes, sir.

Q. Now, did you overhear a conversation between the mate, Roblee, and Mr. Gilbert? A. Yes, sir.

Q. On the third day of October, 1915?

A. Yes, sir; about half past three or four o'clock, I guess.

Q. Now, where were you at the time this conversation was going on? A. I was in the mess-room.

Q. And how far were you from Mr. Gilbert?

A. Well, I guess about eight or ten feet.

Q. And how far were you from Mr. Roblee?

A. About the same distance. They were both right there together.

Q. And say whether or not the door was open?

A. Yes, sir; the door was open.

Q. And could you hear distinctly? A. Yes, sir.

Q. Now, just state what was that conversation between Roblee, the first mate, and Arthur Gilbert, the seaman?

A. Well, now, he came down about four o'clock in the afternoon.

Q. Who did?

A. The mate; and asked Mr. Gilbert why he was not on watch, and Mr. Gilbert told him he was not supposed to be there—to go on watch until six o'clock, and he told him he was supposed to go on watch when it was dark, any time when it was dark; and he told him his time was from six to six. Well, he told him he was supposed to go on at five o'clock. So they went on and he wanted to know whether he was going or not, and he told him no, he was not going unless he was going to give him an hour overtime, which he said he was entitled to. So he said, "Well, if you don't want to go on at five o'clock," he said, "we will get somebody that will." So that was all that was said that day, until we got at Valdez or some place right in there, he came down about three o'clock to look for him, and Gilbert was up town, and when he

did come down he told him his time was made out for him. He would not take his time. So he turned to that night, and there was another man there to turn to too. He came down, I think it was a little—a little later. So they met each other right on the deck. I was standing within about a foot or two away from them, and they started an argument there. He wanted him to go ashore and he would not go ashore, and he told him, he said, "If you want me to go ashore you put me ashore," and that went back and forward quite a while; he said, "Well, if you want me to put you ashore, I will put you ashore," and he took him by the arm and led him ashore.

Q. Now, where was it that he was put ashore?

A. I don't know what is the name of the town.

Q. Do you remember the port?

A. Yes, it was a little lumber mill, it was there, I think. No, it was not there, we left there.

Q. Was or was he not put ashore in Juneau?

A. Juneau is the place where he was put ashore.

Q. You overheard practically every word that was being spoken at that time?

A. Yes, sir; just what I said.

Q. Was Mr. Gilbert—did he seem to be ready and willing to do what was asked of him?

A. Well, he seemed to be willing to, but of course he told him, he said, "If you want me to go to work before six o'clock, if you give me an hour overtime all well and good." I think he asked him if he thought he was kidding him or something, I ain't sure if he did, I know I didn't quite catch that, but anyhow he told him, he said, "If you don't want to put the light up at five o'clock, I will get somebody that will." And so when we got to this other port he got this fellow—he was a prospector, he was no seafaring man at all—and this fellow took his place.

Q. Was this on your outward voyage or inward voyage—return voyage? A. On the outward.

Q. On the outward voyage. Now, the next night, along about what time was it that Gilbert went to work?

A. I guess he turned to at six o'clock that night, because it must have been about half past six when he asked him what he turned to for, he had another man, and he said, "If you want me to go ashore," he says, "you put me ashore." Of course he had his working clothes on then. And they kept going back and forth, and after that he says, "If you want me to put you ashore, all right," and he took and put him ashore.

Q. Did you see Gilbert turn to, as it is called, every day or pretty nearly every day while on this voyage?

A. Yes, sir; about—he always was there ten or fifteen minutes ahead of time.

Q. And what time did he usually turn to?

A. About a quarter to six.

Q. About a quarter to six. And on this particular day that the dispute arose, do you know whether or not he turned to in time or not, the usual hour?

A. Oh, yes, because this arose in the afternoon, probably this was about four o'clock—no, about five o'clock I guess it was, when he was down there, and it was dark then, you see, and asked him why he didn't have the lights on, and then he told him he was not supposed to turn to until six o'clock.

Q. Did he express a desire to turn to if he was paid overtime for it?

A. Yes, that is what he told him. He said, "I will turn to if you are willing to pay me an hour overtime," which he said he would not do.

Q. And the evening that he was put ashore, did he perform his regular duties that evening?

A. Yes, sir; I think he did, put out his lights and everything, I think—yes, sir; I know he did.

Q. Do you know from your own observation whether he did or not?

A. Yes, sir; I am pretty sure he did, because the other fellow didn't—no, I won't swear, either, I guess. I know he turned to at six o'clock, because I went up on deck right after he did and I met the two of them there and I was just about a foot away from them;

but I won't swear whether he did put the lights out that night or not. You see he always gets his lights out forward, you see, and I won't swear whether he did put them out that night or not, because I asked him too, I says, "Have you turned to?" He says, "Yes, I am going to turn to until he puts me ashore"—because I saw him before the mate did and I told him, I says, "The mate is looking for you. He told me—he said he had his time made out for you." "Well," he says, "I ain't going ashore unless he puts me ashore."

Q. How long have you known Mr. Gilbert?

A. Just this trip.

Q. Just this trip?

A. About two months and a half—two months.

Q. As a matter of fact, you were on the boat, on the ship with him the trip previous?

A. No, I was not.

Q. Then just this trip? A. Just this trip.

Q. And during all that time you have seen that Mr. Gilbert performed his duties as an able seaman?

A. Yes, sir.

Q. In a way that able seamen usually do?

A. Yes, sir.

Q. Did he seem to be obedient, in your observations of things did he seem to be obedient to the commands of superior officers? A. No, sir; none at all.

Q. How is that? A. None, not at all, not to me.

Q. You didn't understand my question. I say, did he seem to obey the commands of his superior officers? A. All the time, yes, sir.

CROSS EXAMINATION

Q. (MR. BOGLE). What is your position aboard the "Seward," or what was your position?

A. Well, I was—I went out as messman on her.

Q. What was your duty aboard the vessel?

A. Well, to take care of the officers.

Q. You mean you would clean up the rooms?

A. Yes, sir.

Q. And do you wait on the table?

A. Well, I waited on just the oilers. I had the officers' rooms to take care of.

Q. You cleaned up the officers' rooms and waited on the oilers' tables? A. Yes.

Q. And what were your hours of duty?

A. Well, we didn't have no special hours, just sometimes from 5:30, six o'clock in the morning until half past seven or eight at night; it is just when we get done.

Q. When you get through with your work?

A. Yes, that is it.

Q. And what was Mr. Gilbert's position aboard this vessel? A. Night watchman.

Q. He was night watchman. And what were his duties as night watchman?

A. Well, to attend to the lights.

Q. What lights?

A. Well, the signal lights, and I don't know what you would call them.

Q. Do you mean the ship's regulation running lights? A. Yes, sir.

Q. Masthead light? A. Yes.

Q. Range lights? A. Yes, all of them.

Q. And the side lights? A. That is his duty.

Q. What is the character of the lights on that vessel, oil or electric? A. Electric lights?

A. Electric lights, I am pretty sure they are.

Q. What is his running light, is that an electric light? A. Yes, sir.

Q. Her running light. What is her anchor light, is that an electric light too?

A. Them is the lights on the sides?

Q. The light she uses when she is at anchor, on the forward mast? A. Oh, no, that is coal oil.

Q. On the forward mast, is coal oil?

A. Coal oil. That is one they hoist up.

Q. They use that light when they are at anchor?

A. At anchor, yes.

Q. When did this Mr. Gilbert claim his hours of work commenced?

A. Six at night—six in the morning.

Q. You had no particular hours to work?

A. No, sir; not at all.

Q. You had certain work to do?

A. I have certain work to do and when it is done I was finished.

Q. As far as you know, did Mr. Gilbert have any particular hours of work?

A. No, sir; not only from what way I understand.

Q. What he said?

A. What he said. Of course on other boats what I have been on, of course I know—

Q. I am asking if you know what Mr. Gilbert's hours of work are? A. Just from what he said.

Q. You don't know whether he had a contract specifying the hours of work or not, do you?

A. No, sir; none at all.

Q. So his work started at six o'clock, and your work was usually over by seven? A. Yes, sir.

Q. And he worked—his work was throughout the night to watch the ship, and putting the lights out, to see that there were no fires— A. Yes, sir.

Q. Or any unusual incident. And you came on duty again about 5:30 or six the next morning?

A. Yes, sir.

Q. So that while Mr. Gilbert was engaged in his duty, practically all the time you were off duty, weren't you? A. Yes, sir; practically.

Q. So you don't know whether he was attending to his duty or not, do you?

A. No, sir; not after seven or eight o'clock.

Q. No. You don't know whether he was obeying the commands of the officers or not, do you?

A. No, sir; just what I have heard them say, that is all.

Q. Did you ever hear the officer give him any other orders except that time? A. No, sir.

Q. So that when you say that he was doing his work in a regular workmanlike manner and obeying the commands of the officers, you don't know anything about that, do you?

A. Well, no, just what—like what he did say—what little bit I heard him talk to him.

Q. Now, do you remember when this conversation took place, on what date? A. No, sir; I don't.

Q. Do you remember where the ship was lying at the time? A. No, sir; I don't.

Q. She was not at Juneau at the time this conversation took place, was she?

A. No, sir; not when the first.

Q. Was she at anchor?

A. No, sir; I think we were on our way.

Q. She was not running then?

A. Yes, sir; I think we were running.

Q. You are not sure of that, are you?

A. No, sir; I ain't sure. I never took much notice, because I didn't think anything would turn up about it, to tell the truth.

Q. You would not swear that she was not at anchor and the crew engaged in discharging cargo, would you, at the time this conversation took place?

A. No, sir; I won't.

Q. Now, what did the mate say to Gilbert when he came below?

A. Well, he asked him why wasn't he up on deck, and he told him he was not supposed to be there until six o'clock, and he told him he was supposed to be there when it was dark, and he told him his time was from six to six. "Well," he says, "then you don't intend to put out the lights or don't intend to go to work before six?" And he says, "Not unless you give an hour overtime," and he told him he would not. So then he says—he told him he would not, and then he told him, he says, "Do you refuse?" he says. He says, "Yes, sir; unless you give me an hour overtime." So then he says, "All right." So when he got there he got another man.

Q. In this conversation did he ask him why he was not on duty, or didn't he ask him why he hadn't put out his lights?

A. He asked him why wasn't he on duty.

Q. Did he say anything about his lights?

A. Well, you twist it up. No, I—

Q. You said a minute ago in the examination that he asked him, you said he asked Gilbert—

A. Why wasn't he up on deck and put out the lights.

Q. Yes, that is what he said to him, wasn't it?

A. Yes, sir.

Q. And Gilbert said that he didn't have to go up until six o'clock? A. His time was from six to six.

Q. He refused to go up unless the mate would agree to give him overtime right there?

A. An hour overtime, yes, sir.

Q. And this light, if she was at shore, and that should be up, would be this oil light which you have to run up the mast, isn't it? A. Yes, sir.

Q. The fore mast or the main mast. And it was the next night that they put him ashore? A. Yes, sir.

Q. The mate asked him whether he refused—whether he refused to go up and put out the lights, didn't he? A. The next night?

Q. No, this first night? A. Yes, sir.

Q. And he said he did unless the mate would agree to give him overtime? A. Give him overtime.

Q. And did the mate tell him then that he would get another man?

A. No, sir. When he got there he got another man. He didn't tell him right then.

Q. Did he tell him that he would discharge him if he didn't obey orders?

A. No, he didn't tell him in that way. He says, "Then do you refuse?" He said, "Yes, sir." "All right," he says. Like that.

Q. Are you a Union man? A. Yes, sir.

Q. What union do you belong to?

A. Union Cooks and Stewards.

Q. Do you know whether or not Mr. Gilbert was a union man? A. Only from the book he showed me.

Q. What book was that?

A. Sailors' Union Book.

Q. What do you mean by Sailors' Union Book?

A. Well, we all carry a union book.

Q. Is that issued by the Union?

A. By the Union, yes, sir.

Q. Is that it? (Showing.)

A. No, sir; it is a black book like this. I think his is about the same. (Showing.)

Q. Well, he had a little book issued by the Sailors' Union, did he, of the Pacific?

A. I think that was the rule, wasn't it? They got books out like that with the rules too, but the Union Book is like the one I showed you.

Q. You don't know whether he had one of these books?

A. I think he showed me one in his room there that night he was put shore.

Q. One of those books?

A. Yes, sir; I think he was reading or looking it over or something and showed it to me.

Q. That is the book of "Agreement between Puget Sound Shipping Association and the Sailors' Union of the Pacific?"

A. Yes, sir; I think that is what it is that he showed me.

MR. BOGLE: I will have that marked for identification.

Book referred to was marked Respondent's Exhibit "1."

REDIRECT EXAMINATION

Q. (MR. WIENIR): You think you saw this little book by Mr. Gilbert?

A. Yes, sir; I seen it in his room.

Q. As a matter of fact are not there a great many little books just about the one size, that sailors generally have around? Did he read you any of the provisions in that little book?

A. Yes, I think he did read over one or two of them about—because I asked him, I said, "Now, are you sure of what you are doing?" "Well," he says, "here it is right here in black and white," and I think he read it to me right there in the room.

Q. Where was it that he read it to you?

A. In his room. You see I was taking care of him.

Q. When was this, when was it that you saw him read from this little book?

A. That is when the mate put him ashore, when he came back downstairs.

Q. Had the mate already put him ashore then?

A. The mate already put him ashore.

Q. And he had come back?

A. I think he looked at it, though, the day before, too, he looked at it before.

Q. How do you know that?

A. Well, I seen it before I am pretty sure.

Q. Did you see him look at it before? Can you swear that you saw him look at that book before?

A. No, I can't swear; I would not swear, because I ain't sure, only—I can't even—I would not swear that—that was the only time I swear was when he came down that night and we were talking it over and then he showed me the book, read about the different rules of the Northwest Passage—

Q. Do you know whether it is this book that is being marked for identification now, or might it have been any other little book?

A. Well, I don't know. All I know is from the outside, the cover. Of course I don't know what book it is, you know.

Q. You don't know what book it is?

A. No, sir; only he had a book of rules, looked just about the same as that, on the ship.

Q. When was it that he read that to you?

A. I think when he came back downstairs.

Q. What did he come back for?

A. Came back for his clothes and things.

Q. Was this before or after his discharge?

A. That was after his discharge.

Q. Did you see the first mate put Gilbert ashore?

A. Yes, sir; I seen him take him right by the arm and lead him ashore.

Q. Did you overhear any words that were spoken by the first mate?

A. Only when he was standing up there like I told you, just before he put him ashore. He was telling him to go ashore, and he told him he would not go ashore unless he put him ashore. So they kept

going back and forward. So he says, "If you want me to put you ashore, all right." So he just takes him by the arm and puts him ashore, and the purser just went by at that time, and he hollers to this purser, he says, "Did you see that, Mr. so and so?" And the purser says, "Yes"—something like that.

Q. Did you hear any remarks by Gilbert as to why he didn't want to go ashore?

A. Why, he said he would not—no, I don't think he did make any remarks to him about it. Of course he—

Q. Did he say as to whether or not he was willing to go to work?

A. Oh, yes; he was willing to go to work. He did turn to that night to go to work. He was already turned to that night, and the mate told him that he was canned and told him that he had another fellow.

RECROSS EXAMINATION

Q. (MR. BOGLE): What was it, Mr. Woolhouse, that Mr. Gilbert was reading to you out of this little book, do you remember what the substance of it was?

A. No, I—well, it was just about different rules of sailing either one way or the other it was, you know, out of the book—different regulations he said that was one way and the other. That is what he was reading.

Q. In connection with the sailor performing his duty—was that what it was? A. Yes, sir.

Q. Did it have anything to do with the Union—Union Rules and Regulations?

A. Well, that was supposed to be the Union Rules and Regulations in that book.

Q. You were talking to him about the position he was in, were you? A. Yes, sir.

Q. And he thought that he was perfectly safe, did he?

A. He thought he was all right. He said—that is "If they put me ashore," he said, "I am willing to go to work unless they put me ashore."

Q. This was the next night after they had had the trouble? A. Yes, sir.

Q. And he read over these rules, and did he read any particular rule to you?

A. No, none particular. I just—to tell the truth I didn't take much notice of it at all, because I didn't think it would come to anything at all. I was standing there and he was looking over the book and read over this rule about this certain passage. He said it was different rules different ways.

Q. A certain passage about a sailor performing his duty, was it? A. Yes, sir.

Q. Was there any passage in there about overtime, that he was reading to you?

A. No, sir; I don't think there was, none at all.

Q. You say this was after the mate had discharged him?

A. After the mate had discharged him.

Q. It was after he had put him ashore?

A. Yes, sir.

Q. And he got back aboard the ship after he had put him ashore, did he?

A. He came back for his clothes after he put him ashore.

Q. Did you see the mate lead him right ashore?

A. No. They both stood on the deck and the mate took him by the arm and walked up to the edge of the ship, and the ship was up pretty high, and just raised him right up and put him shore.

Q. He did that because Gilbert said he would not go ashore unless he put him ashore?

A. Gilbert told him, "If you want me to go ashore, put me ashore."

Q. And isn't it a fact the mate just put his arm on Gilbert and Gilbert says, "That's all right, I just wanted you to do that. Now I will go ashore"—didn't he?

A. Well, after he put him ashore—after he put him ashore I think he did tell him—

Q. Oh, well, it is not material.

A. I wouldn't swear whether he did or not. I don't remember whether he did or not.

(Witness excused.)

CEZAR CURTY, produced as a witness on behalf of LIBELLANT, having been first duly sworn by the Notary to tell the truth, the whole truth and nothing but the truth, testified as follows:

Q. (MR. WIENIR): State your full name, Mr. Curty. A. My full name?

Q. Yes. A. Cezar Curty.

Q. How old are you? A. Twenty-eight?

Q. And you are an able seaman? A. Oh, yes.

Q. And you were employed on the steamship "Seward" with Mr. Gilbert? A. Yes, sir.

Q. On the trip to Anchorage, Alaska, and return? A. Yes.

Q. And did you know Mr. Gilbert at the time you were signing articles—shipping articles?

A. Oh, I don't know him, I don't know him very well. I know he was on board the vessel with me together, and that is all I know of him.

Q. You know him since you have met him on the vessel? A. Yes, that is all, yes.

Q. What are your hours of work, Mr. Curty?

A. Well, I was day-man on board there. My hours were nine hours a day.

Q. Nine hours a day?

A. From seven in the morning until five in the evening.

Q. In what capacity were you working on the boat? A. As able seaman.

Q. Do you recall the 4th day of October, 1915?

A. Oh, yes.

Q. Do you recall the time when Mr. Gilbert was put ashore?

A. Yes, it must have been about between seven and eight o'clock in the evening.

Q. Of what date?

A. The 4th day of October, I think it was.

Q. Just tell us what occurred at that time?

A. Well, I was working on the dock landing loads, and I saw Mr. Gilbert and the mate speaking together, just about on the outside of the captain's room on the after part of the vessel, and I don't know, somehow or

another I saw the mate getting hold of Mr. Gilbert's arm and he shoved him towards there and he says "You get the hell on shore out of this and hurry up about it, too," and then of course Gilbert he had to jump over the rail.

Q. You didn't overhear any conversation?

A. No, I didn't.

Q. You don't know anything else outside of seeing the first mate take Gilbert by the arm and put him ashore?

A. He took him by the arm, he got hold of his arm and shoved him towards the railing. He says, "You get to hell on shore and hurry up about it, too."

Q. Mr. Curty, do you recall any statements that the captain made after Gilbert was put ashore?

A. Yes, sir, it was about I guess fifteen minutes after Gilbert went on shore.

Q. (MR. BOGLE): Fifteen minutes after this?

A. After this, that the captain and mate were speaking together, and I heard that much—

Q. Captain—what is his name?

A. Captain Johnson. He says, "That's right," he says, "fire the man," he says, "we don't need no watchman anyhow"—"we don't need no God damn watchman anyhow." That is all I heard.

Q. Where were you at the time that was spoken?

A. Oh, I was—well, I don't think it was very far, it was just on the dock, you know, close to the railing of that vessel.

Q. How far were you from the speakers? You overheard the words that were spoken? A. Yes.

Q. You overheard every word?

A. Yes, very plain. It was loud-voiced, you know. Any other words, more conversation I didn't overhear between them. No, I didn't hear any more.

Q. Did you have any opportunity to observe Mr. Gilbert at all on the ship, Mr. Curty?

A. Well, I really never interfered with his business any otherwise.

Q. On this particular night in question he was

performing his regular duty—do you know whether he was or not?

MR. BOGLE: This was on October 4th?

Q. (MR. WIENIR): On October 4th?

A. Well, I could not say anything about that. I just saw Gilbert during the supper hour, said, in the fore-castle, that he was going to put the lights out, and then afterwards I didn't see no lights out there. They must have had some kind of an argument, and then I noticed them ship him ashore. I don't know what is was.

Q. Did you see Gilbert perform his duties that evening say between the hours of six and seven?

A. No.

Q. You did not? A. No.

Q. Were you in a position where you could see him do that?

A. Well, no, I was not exactly in a position. I was on the dock, you know. I could not watch everything. He might have put the lights down in the hold or he might have put them on deck and I would not take notice of them.

CROSS EXAMINATION

Q. (MR. BOGLE): Have you ever been a watchman? A. No, sir, I never have been a watchman.

Q. You don't know what a watchman's duties are?

A. Yes.

Q. It is his duty to put out the lights?

A. Yes, the watchman generally puts out the lights. That is his duty, you know, putting out those lights—cluster lights, and down in the hold.

Q. Did you ever see anybody else on the ship putting those lights out?

A. Why, no. Sometimes the mate do, you know, when the watchman is really busy, they may give him a hand in putting them out, but any other wise the watchman always does it.

Q. You didn't see Gilbert on the night before, October 3rd, did you, the night before he was put off the ship?

A. Oh, I might have seen him, but that is about

all. I never took no notice of his doings and so on. I never hardly spoke to the man.

Q. On this particular night you say you saw him down in the messroom?

A. No, down in the forecastle forward.

Q. Forecastle forward? A. Yes.

Q. Getting out the lights?

A. No, he was speaking about putting out the lights.

Q. Oh, he was just speaking about it? A. Yes.

Q. You were lying at Annex then, weren't you?

A. Yes, we were laying over there in Sheep Creek. No, in Juneau we were laying.

Q. Well, right in Juneau. You were lying at Sheep Creek the night before? A. Yes.

Q. What time was this—

A. Well, we were lying in Annex the night afterwards, not before.

Q. This night anyway, on October 4th, you were lying at Juneau?

A. Yes, we were at Juneau, at the City Dock.

Q. And he was in the forecastle talking about putting out the lights? A. Yes.

Q. What time was that?

A. Well, it was during the supper hour, about six o'clock, something about six o'clock.

Q. Was it dark then?

A. Well, I guess—I should judge it was kind of dark all right.

Q. You say that your hours are from seven in the morning until five at night? A. Yes.

Q. Who fixed those hours?

A. Well, that is agreement between the ship owners and the Sailors' Union, that the working hours for day men shall be nine hours, and quartermaster, they are going watch and watch.

Q. Do you know what that agreement provides for in the case of night watchman?

A. Well, according to the seamen's rules, what we got up here, I notice there was a little bit, not very much—agreement between the ship owners' associa-

tion and the Sailors' Union is that watchmen shall perform the regular duty—watchmen and station men.

Q. Does it say what hours they shall keep?

A. Oh, yes.

Q. Do you know what hours they are to keep?

A. Well, when they shall be called on deck between the hours of seven in the morning and five o'clock in the evening, they shall be paid at overtime rate.

Q. That is when they are called between seven in the morning—

A. (Interrupting): Yes, that is what I kind of think. I am not positive sure, but I think that is what, anyhow.

Q. (MR. WIENIR): You don't know?

A. I don't know exactly, but I kind of thought that is what I seen.

Q. (MR. BOGLE): Do you know what the working hours are in port, when vessels are in port?

A. Well, I don't know exactly that they have got any agreement to that effect, or not, I could not tell you exactly.

Q. But your agreement in connection with the shipping on this Coast, or out of this harbor, is covered by that agreement between the Puget Sound Shipping Association and the Sailors' Union, isn't it?

A. Yes, that is what it is.

Q. That fixes your hours, does it?

A. That fixes our hours.

Q. That provides for the overtime, doesn't it?

A. Overtime and everything necessary working, you know.

Q. Outside of that agreement, do you know of any provision that allows seamen overtime?

A. No, not outside of that I don't know.

Q. Outside of that?

A. Sundays and holidays, of course.

Q. Did you ever have any dispute about overtime in your hours of work?

A. No, I never had. I always went up and straightened with the mate right away when I worked any overtime, so I couldn't have any dispute.

Q. Did you ever refuse to go to work because it was not doing your regular hours?

(No response.)

Q. For instance, if you were called on to go to work between five and six at night, do you do it?

A. Oh, yes, they can shift the working hours. They can shift the meal hour from five to six; I have got some work to do, they can shift the meal hour ahead and back.

Q. You frequently work between five and six at night?

A. Oh, yes, I have worked between five and six. I have worked until six and took my supper like from that to seven, you know.

Q. And you got overtime from five to six?

A. Oh, yes.

Q. Isn't it a fact that you were working when you were at Annex, up until six o'clock? That is the day before you got to Juneau, the night before you got to Juneau?? A. At Annex?

Q. Yes, or do you remember that?

A. I don't exactly remember that. I could not tell you.

Q. Now, Mr. Curty, are you familiar with this agreement, do you know what that provides?

A. Well, I only just read what it says in there, that is all.

Q. Does the Sailors' Association furnish you boys with these agreements?

A. Yes, we get one of those agreements. We get whatever ones it is they have.

Q. It is this agreement between the Shipping Association and the Sailors' Union? A. Yes.

Q. They provide you with a copy of that, do they?

A. They provide us with a copy of it.

Q. Are you instructed to abide by those?

A. To abide by those rules, and, furthermore, I think the mate on board the vessel has got one of them, too.

Q. Did you ever refer to them? Your agreement as to overtime and time of work and everything is covered by that agreement, isn't it?

A. Yes, it is covered by that.

Q. When the mate took hold of Gilbert's arm, where did he lead him to, over to the rail?

A. No, not over the rail, but he led him right up to the rail.

Q. How far was that?

A. Oh, it was a couple of feet.

Q. A couple of feet. And then he let him go there, didn't he? A. Well, yes, I guess he did go.

Q. Gilbert jumped over the rail himself?

A. He jumped over the rail himself. He had his foot out—

Q. Did you hear him say anything to the mate then? A. No, Gilbert never said a word.

Q. Did the mate say thing except to tell him to get off? A. No, he didn't keep on saying any more.

Q. Now, when did you hear the captain make this remark? A. Well, it must have been—

Q. After that, wasn't it?

A. (Continuing)—after that. It was about fifteen minutes after that, I guess.

Q. And you said the captain said they didn't need a watchman anyhow? A. Yes.

Q. Did they have a watchman for the rest of the trip? A. Oh, yes, they got one the next day.

Q. They got one at Juneau, did they?

A. Yes. He came aboard in Annex, I think it was.

Q. Sheep Creek?

A. Yes, Annex is what we call the place.

REDIRECT EXAMINATION

Q. (MR. WIENIR): Now, do you know what the average pay was for seamen getting \$50 a month and 50 cents an hour overtime, during this last trip?

A. The average for this, do you mean?

Q. Yes. A. Why, time between the—

Q. For those fellows getting \$50 a month and 50 cents an hour overtime, do you know? Answer "Yes" or "No," first.

A. You know we got different, we got different.

Q. Well, just the average, say, some fellows get-

ting a little more and some fellows getting a little less, but about the average?

A. Take the average I guess is about \$90 a month.

Q. How is that?

A. \$90, I guess, if you take high and low together.

Q. Now, just answer this question first: Do you know what the average wages is for seamen getting \$50 a month, for this return trip from Seattle to Anchorage, Alaska, and return?

A. How much we made on the voyage, you mean?

Q. Well, do you know what seamen earning that much money—earning \$50 a month—do you know what they earned on this round trip?

MR. BOGLE: I object to that is immaterial.

A. Well, some of them they made I think \$173. I made about—

Q. Answer me whether you know, or not, first. Do you know what the average is?

A. No, not exactly, I don't know.

Q. Well, that is all right. I guess that is all.

RECROSS EXAMINATION

Q. (MR. BOGLE): What did you mean when you said \$90 a month for the high and low?

A. You know if you take into consideration some fellows may make \$110 and the other fellow may make \$85, you know, take them all together and split it up, you know, that may be \$90 apiece; that is the way I figure.

Q. That includes overtime, does it?

A. Overtime, yes.

Q. Does the watchman have an opportunity to make the same overtime that the A. B.'s do?

A. Yes, they generally make more on some of the ships.

Q. How would they make more on this ship?

A. Because when they are working at night times, you know, every time a watchman works is 50 cents an hour, besides his monthly wages.

Q. When he works at night time?

A. Night time or in day time, it don't cut any figure, it is 50 cents an hour.

Q. He is on duty at night isn't he?

A. Yes, but sometimes they put a watchman to work anyway.

Q. When he is on duty? A. Yes.

Q. And he makes 50 cents an hour when he is working? A. Yes, any time he works.

Q. Well, you don't have a watchman when he is working at some other employment then, do you?

A. Maybe the mate watch out himself then. Sometimes they do that.

Q. Do you know that the watchman gets overtime for at night when he is on duty?

A. Oh, yes, he gets—the watchman, as long as he handles any cargo, anything outside of putting out his lights and so on, he gets overtime.

Q. His regular duties are to put out the lights and walk around the ship?

A. Walk around the ship and see that everything is all right.

Q. And to take the lights in in the morning when they are through with them? A. Yes.

Q. Do you know whether this watchman was working with you at Sheep Creek, or Annex, rather?

A. No. I didn't work that together—he might have been working somewhere else; I was working on the dock, you know, all the time.

(Witness excused.)

P. BERING, produced as a witness on behalf of LIBELANT, and having been first duly sworn by the Notary to tell the truth, the whole truth and nothing but the truth, testified as follows:

Q. (MR. WIENIR): State your name?

A. P. Bering.

Q. State your age. A. Twenty-two; 1893.

Q. Were you employed on the steamer "Seward" on this last trip to Anchorage, Alaska, and return?

A. Yes, sir.

Q. Now, Mr. Bering, did you have an opportunity to observe Mr. Gilbert while he was working and while he was aboard the steamship "Seward"?

A. Yes, I have. I can tell that he always did his work, when he was told.

Q. You had an opportunity to see him work?

A. Yes, I did.

Q. And so far as you know, Mr. Bering, he has always done his work well and has obeyed the commands of his officers? A. Yes, sir, he did.

Q. Do you recall this 4th day of October when Mr. Gilbert was put ashore?

A. Yes, sir, I remember that.

Q. And just tell us what you saw on that occasion?

A. Well, I saw that just after seven o'clock when I should have to oil up the winches, and I was going up and I saw Mr. Roblee put him on shore over the rail.

Q. How did he do it?

A. Had him like this, something like this (illustrating). I could not hear what he said because it was about 25 feet, something like that, away; I could not hear what he said.

Q. Well, it seemed to you to be a forcible—put him off forcibly, or what?

MR. BOGLE: I object to that as leading.

Q. (MR. WIENIR): Well, just tell us how did he do it. Just tell us how he got hold of him and how he led him off, if you can?

A. He got hold of him like this, one hand underneath and one on the arm, what I seen, and put him on shore. Of course Gilbert was climbing over the rail onto the dock, you see. I don't know if it was by force, because I don't know—it looked that way, any otherwise he would go over the gang plank.

CROSS EXAMINATION

Q. (MR. BOGLE): You were an A. B., were you? A. No, I was a winch driver on the "Seward."

Q. What are your hours?

A. My hours are seven in the morning until five in the afternoon.

Q. Seven in the morning until five in the afternoon? A. Yes sir.

Q. How are your hours fixed?

A. That is our regular hours; but then any time after that is overtime, you see.

Q. According to what agreement is that?

A. Well, sir, to the agreement we got with the ship owners for nine hour day while we are at sea, and at port that we have to work the ship through as long as any cargo left or any cargo going on board, we work the ship until it goes out; sometimes we work forty-eight or fifty-two hours or fifty-eight hours on a stretch, you see; just according to how much cargo she got on and how much she has got to take on again.

Q. It is your duty to work cargo, isn't it. A. Yes.

Q. You do that duty as long as there is any cargo to work?

A. As long as there is any left going on board, until there is nothing left. My place is on the winch or on the dock, one of the two.

Q. And if you work after five o'clock you get overtime? A. Yes.

Q. That is according to your agreement with the ship owners? A. With the ship owners.

Q. Are you familiar with that agreement?

A. I am.

Q. Yes, are familiar with that agreement.

A. Oh, yes.

Q. I will hand you this respondent's exhibit "1" and ask you if that is a copy of that agreement?

A. No, it is not.

Q. Read it, look at it and see if it is not. (Handing.)

A. No, that is not the agreement we got for the southwestern run. We made a special run with the Alaska Steamship Company for the—we got an agreement for the southeastern run and the southeastern and southwestern, the southeastern and Bering Sea.

Q. Yes, there is an agreement between the Puget Sound Shipping Association and the Sailors' Union of the Pacific Coast, for the Bering Sea and southwestern Alaska run? A. Well, now, let me look.

Q. It might not be in the same binding that you

are familiar with, but look and see if it is the same agreement. (Handing.)

A. (After examining.) Yes, it is in the same form, but the one we have is a different agreement, just for Alaska—

Q. The same agreement?

A. The same form, yes sir.

Q. And that is the agreement that governs your employment? A. Yes sir.

Q. You understand that, do you?

A. Yes, I understand that.

Q. The watchman is not on duty in the day time?

A. No, he is supposed to go on watch at six o'clock at night—from six to six.

Q. According to what agreement is that?

A. According to what time the watchman has got—watchman has no special agreement with the ship owners whatsoever, but then that is the rules for all the years I have been at sea, anyway, that they go on watch from six to six.

Q. It is his duty to put out the lights?

A. To put out the lights and see the lines are all right; if they are not, to report to the mate.

Q. If you are in port and it is dark before six o'clock, doesn't the watchman have to put out the lights?

A. Well, if he is told to, yes, but that is overtime, you see.

Q. If he is told to, and he gets overtime for that?

A. Yes.

Q. That is according to this agreement, is it?

A. This agreement what we got with the ship owners, the rules the way they work it right through.

Q. Your being on duty in the day time and the watchman being on duty at night, how did you have much opportunity to observe the watchman?

A. Well, we generally—you know I see the watchman every time, every port we get in we always get a night or three or four nights in port where the watchman is always around and asks us if we want anything, around the winch drivers anyway, because we get our lights from him.

Q. When you are off duty you are down in the forecandle? A. Down in the forecandle or aft.

Q. And when you see him is when he comes down to ask you if you need anything?

A. I see him because when I am working I am on the deck; he is always around us.

Q. Did you pay any particular attention to observe how he was doing his duties?

A. Yes; as far as I know he always did his work, when he was told, and I know he knows his work.

Q. Did you ever hear anybody tell him to do anything? A. Yes, I did, lots of nights.

Q. And he would do what he was told, would he?

A. He did what he was told, as far as I know.

Q. As far as you know. You were not following the watchman around to see whether he was doing his duty or not, you were busy yourself, weren't you?

A. To an extent. Because lots of nights the mate came down and asked me and says "How does the lights suit you?" I says "I have a man there—so I can see the man in the wing," whatever it was, and he told the watchman to do it and he told him what I told the mate.

Q. And it was when that came under your particular observation that you would notice what he was doing; you don't want the court to understand that you were around following the watchman to see whether he was doing his duty or not?

A. Oh, you can see that, if he is doing his duty or not. What he has to do is to put lights up. Say we are laying alongside of the dock, he has to put certain lights up, riding lights, and if you lay an anchor you can see if he has them placed right or not when you pass there.

Q. That is his duty there?

A. That is his duties.

REDIRECT EXAMINATION

Q. (MR. WIENIR): Do you know what the average wages were on this round trip, for seamen getting \$50 a month and 50 cents an hour overtime?

MR. BOGLE: I object as immaterial.

Q. (MR. WIENIR): Do you know?

A. Well, I know I had one hundred and fifty-five, but then—

Q. Just answer that question. Do you know what the average of the wages was?

A. Yes, I know. It was between—

Q. What was that average?

A. It was between \$136, I think, and \$180.

RECROSS EXAMINATION

Q. (MR. BOGLE): One hundred and eighty for what? A. For the quartermasters.

Q. For the quartermaster?

MR. WIENIR: My question was for seamen, for these fellows that get \$50 a month and 50 cents an hour overtime.

THE WITNESS: All alike.

Q. (MR. BOGLE): And they all got \$90 a month?

A. Quartermasters, they all get the same wages.

Q. You mean some of them made \$180 a month?

A. Well, they did. I made a little over one hundred and fifty-five.

Q. (MR. WIENIR): You mean on this round trip?

A. Yes, for this round trip. It was a little over—well, I could not tell exactly now how much we were down on the Shipping Master for, but I know I had a little over \$155.

Q. (MR. BOGLE): You did that how many times? A. For this last round trip.

Q. That last round trip? A. Yes.

Q. How often would you average that?

A. Oh, about every six weeks.

Q. That would be six weeks' work?

A. Six weeks' work, something like that. Sometimes you make it in a month; just depends on how you get to the ports to get nights in, you see.

Q. (MR. WIENIR): On this particular trip?

A. On this particular trip we made between one hundred and thirty-six and about one hundred and eighty.

Q. (MR. BOGLE): Who made one hundred and eighty on that trip?

A. One of the quartermasters; Charlie Carlson was his name, I think.

Q. He was a quartermaster?

A. Yes, he was a quartermaster.

Q. You were winch-driver, and you made one hundred and fifty-five. A. Yes.

Q. And what did some of the other men, the seamen, make?

A. Well, about one hundred and thirty-six; one hundred and forty, some of them.

REDIRECT EXAMINATION

Q. (MR. WIENIR): Mr. Bering, are you in a position to earn more overtime than Mr. Gilbert is?

A. Oh, yes, I am.

Q. You are? A. Yes.

Q. Well now, do you know any man on the boat that would get the opportunity to work overtime about as much as Mr. Gilbert?

A. I think they get the opportunity, as far as that goes, because if the boat is in like that they haven't got many longshoremen up there and they work all hands on board the "Seward," oilers and everybody, everybody is working; even the engineers was working last trip.

Q. And the watchman would work as well as any of the rest of the fellows?

A. Yes; even the engineers were working, the first assistant and all.

(Witness excused.)

State of Washington, County of King—ss.

I, EARL E. RICHARDS, a Notary Public in and for the state of Washington, residing at Seattle, in said county, do hereby certify that:

The annexed and foregoing depositions of the witnesses Oliver Woolhouse, Arthur J. Gilbert, Cezar Curty and P. Bering, on behalf of Libelant, were taken before me and reduced to writing by myself at Seattle, in said county and state, on the 23rd day of November, 1915, in pursuance of the annexed stipulation.

That the above named witnesses, before examination, were by me duly sworn to testify the truth, the whole truth and nothing but the truth.

That the reading and signing of said depositions by the said witnesses was expressly waived by the respective parties hereto, by their proctors.

I do further certify that respondent's exhibit "1," hereto attached, is the paper offered in evidence by proctor for respondent and claimant in connection with the cross examination of the libelant herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal this 8th day of January, 1916.

(SEAL) EARL E. RICHARDS,
Notary Public in and for the state of Washington, residing at Seattle in said state.

Indorsed: Depositions of Oliver Woolhouse, Cezar Curty and P. Bering, on behalf of Libellant, taken on the 23d day of November, 1915, at Seattle, Washington, before Earl E. Richards, Notary Public. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 10, 1916, Frank L. Crosby, Clerk. By E. M. L., Deputy.

TESTIMONY TAKEN IN OPEN COURT

This cause coming on for hearing on January 10th, 1916, before the Honorable Jeremiah Neterer, Judge of the above entitled court.

The libelant appearing in person and by his attorney, Mr. Eimon L. Wienir.

And the respondent and claimant being represented by their attorney and counsel, Mr. Lawrence Bogle (of Messrs. Bogle, Graves, Merritt & Bogle).

Thereupon the following proceedings were had and testimony taken, to-wit:

ARTHUR J. GILBERT, the Libelant, having been first duly sworn, testified as follows:

Q. (THE COURT): What is your name?

A. Arthur J. Gilbert.

Q. (MR. WIENIR): Mr. Gilbert, state what is your age? A. Twenty-five.

Q. And what is your experience as a seaman?

A. Well, I hold a government certificate—able seaman's certificate.

Q. And state the number of that certificate and the date when it was issued?

A. It is number 844, issued on the 30th day of October last.

Q. (THE COURT): What certificate is that?

A. The government certificate, sir.

THE COURT: Yes.

A. Certified—

Q. (MR. WIENIR): And state the number of years that you have been a seaman.

A. Well, I have been a seaman for over three years.

Q. When were you first employed at the steamship "Seward"—when did you enter into the employment of the steamship "Seward?"

A. The 30th day of July last.

Q. And where did you make the first trip to?

A. To Knick Anchorage and back, from Seattle.

Q. And when did the ship return to Seattle?

A. From the first trip?

Q. Yes.

A. It was somewheres about the 13th or 14th of September. We were paid off on the 19th of September.

Q. State whether or not you stayed by the ship—

A. Yes, I did.

Q. (Continuing) —after that first trip?

A. Yes, I did.

Q. Mr. Gilbert, you signed shipping articles with the steamship "Seward," you signed shipping articles?

A. Yes, yes.

Q. On the first trip? A. Yes.

Q. And on the second trip? A. Yes.

Q. What arrangement did you have, for the first trip, what were your hours of employment?

A. From 6 p. m. until 6 a. m. the next morning.

Q. And what was your work?

A. Well, I came on watch at six o'clock and I sounded the bilges and filled the galley coal bunker,

and had other jobs that the mate would give me around the deck.

Q. You had better state quite fully just what your duties were on there, if you can?

A. Well, I was going around and looking after the safety of the ship, looking to see that there was no fire around between decks, and going around to make my round as a watchman usually does.

Q. What kind of lights did the steamship "Seward" have, I mean running lights? A. Electric.

Q. Electric lights. And was it your duty to turn those on when you went on watch?

A. No, I never turned those on.

Q. Did you turn those lights off? A. Only once.

Q. Who employed you on your first voyage on the steamship "Seward?"

A. The first mate, Bloomberg.

Q. And on your second voyage, after you stayed by the ship, who hired you and made the arrangement with you?

A. Well, I stayed by the ship for—let's see—three or four days, something like that, and I was away from the ship for two days, and I came back and—I was away from the ship Friday night and Saturday night, and I came back Sunday morning, and the first mate, Mr. Robblee he said that—asked me where I had been. I told him I had been over to Everett and around different places looking for the ship, I couldn't find her, so I waited until she came back to Seattle; and he said the captain was raising the devil about me not being there. So he said he didn't know just what to do about me, but he would see the captain and see if he could fix it up. So I waited around for a while, and I asked him, I says, "How about me going on deck with the sailors forward?" And he said "No," he said he wanted some old-time sailors; after a while he came back—a few minutes later he came back and told me that it was all right, he says, "You go to work the same way as you was before." We signed on about the 26th of September, something like that.

Q. And did you perform the same duties on the second trip that you did on the first? A. Yes.

Q. And state the hours of work, state whether or not they were the same?

A. Yes, I worked the same hours.

Q. And also just what shift did you work?

A. From six p. m. until six a. m.

Q. Now, do you recall the afternoon of October 3rd, 1915? A. Yes, sir.

Q. What occurred that day?

A. Well, I had a discussion with the mate about a quarter to five, after I had finished eating supper, and I was going around to my room to get dressed to go on watch at six o'clock.

Q. What time in the day?

A. About 5:45. And I met the mate there and he says, "Watchman," he says, "why aren't you on deck?" So I looked at my watch and saw what time it was, it was still a quarter to six by my watch. So I told him it was not six o'clock yet, and he said, "Six o'clock nothing," he says, "you are supposed to be on watch at five o'clock in port." Well, I told him no, I was not supposed to be on watch at five o'clock in port, I said my hours were from six to six, that is an agreement I made when I shipped; and he says "You had better come on five o'clock in port." I says, "All right, I will come on watch at five o'clock in port," I says, "it don't make any difference to me, only I have got an hour more overtime for it." And he says, "Overtime be God damned," he says, "you come on watch at five o'clock, or," he says, "I will put you ashore in Juneau." I told him that he could not kid me that way, I was too familiar with the duties of a watchman—watchman's duties; and he said he was mate aboard the ship and he was going to be mate aboard the ship, and that ended the discussion there.

Q. State whether or not you turned to that evening at the usual time?

A. Yes, or a few minutes before, to be on the safe side.

Q. State what you did that evening?

A. Well, I went to my room and finished dressing, getting the rest of my working clothes on, and I went out on deck and went forward, and I saw one of the fellows putting up a light—an anchor light hanging to the rigging; so I went down below and I got the electric light—that was an oil light—I went down and got an electric light and hung it up on the light halyard. I took this other one down because this other one was not in the proper place, as I understand; then I went and took up another for a riding light. There was only one riding light at the time and a ship of that size must have two riding lights, according to law—according to the law that is on the ship there—in the government law posted on the ship. So then I went around and I lighted more lights around and I lighted more lights around the deck and along the edge of the hatch, and put up more cargo clusters. So then I sounded the bilges, and I filled the galley coal bunker, and I took down the flags.

Q. In other words, Mr. Gilbert, did you perform the duties which were required of a watchman, that evening? A. Yes, sir.

Q. Who saw you perform those duties?

A. Well, there was P. Baring.

Q. Did the mate, Robblee, address you at all and give you any commands that evening, did he see you?

A. After this discussion, you mean?

Q. That evening, the evening of October 3rd, when you were working?

A. Well, at six o'clock they had finished working, and from six to seven they were taking their supper hour, and then—they started to work again at seven o'clock, and a sling carried away and a piece of pipe fell on a man and hurt a man there, a few minutes after seven. So they finished working for the night, and he came along to me, told me to go tell the engineers to loose off the lights 'tween decks because they had so much dynamite there they were scared it might ignite, and he told me to put more lights along the hatches—up on deck along the edges of the hatches, so nobody would fall down the hatch, and he told me

also to keep a lookout for ice; he said he had a man standing anchor watch that afternoon, standing by that afternoon.

Q. Mr. Gilbert, did you quit at six a. m., that is, the next morning you quit your work and went below?

A. Yes, sir; six a. m.

Q. And what did you do next?

A. Well, the ship went back to Juneau in the meantime, so I went ashore about half past twelve, at noon, and I was ashore until about half past two. When I came aboard again I met the mess-boy, Woolhouse. He said the mate was looking for me, and he said, "The mate was going to put you ashore" because he had told him so. Just then the mate came around through the alleyway from the starboard side and I met him and he said, "Come here, Gilbert, I want you." So I went around to his room with him, and he says, "Check up your overtime." So I checked up the overtime. He says, "You have got three and a half hours coming to you." He says, "Is that correct?" I says, "Yes, sir." He says, "You have got thirteen days' pay coming to you." "Well," I said, "I haven't got no—I don't want no thirteen days' pay," I said, "It is only customary to collect my hours' overtime when I was outside—to get the thirteen days' pay from the shipping commissioner when we get back to Seattle." He says, "Oh, well, you want it now, you are going ashore in Juneau here." "Well," I says, "No," I says, "I am not going ashore in Juneau here." "Well," he says, "I am going to put you ashore." "All right," I says he could not put me ashore—could not put me ashore and be right. So he says, "I will put you ashore all right when we get good and ready to go." So he says, "If you know when you are well off," he says, "you will take your time check now and go to the purser and get your money," and I refused it. So I went down below and I got my supper about five o'clock, and I went around, and as usual got my working clothes on to go to work at the usual time, and I did go to work at the usual time and done my usual work. I sounded the bilges first, and filled the galley

coal bunkers, and I put up one or two lights—most of the lights were up when I came on deck—and made several rounds to see everything was O. K. And about a quarter past seven this mate told me to go ashore, and he told me I need not go to work that night; he says, "You are through," he says, "you need not go to work tonight," he says, "I have got another man in your place," he says, something to that effect. And I told him that I was not going ashore. Well, he said, "I will put you ashore." "Well," I says, "that's altogether different," I says, "if you want to put me ashore you can put me ashore, but I won't go ashore, because you can't put me ashore and be right." So he says "All you want is to be put ashore," he says, "I will put you ashore." And so he grabbed me by the arm and started to put me over the ship's side, on the dock, and before he pushed me over he says, "No," he says, "we will get the gang plank out." So he led me forward to the gang plank and put me ashore at the gang plank.

Q. Mr. Gilbert, did you say that you went to work that second evening at the usual time, to perform your usual duties, until you were discharged?

A. Yes, sir.

Q. Were you called before five o'clock and told to be on deck? A. No, sir.

Q. Either the first day or the second? A. No, sir.

Q. Do you know the rule—state whether or not you know the rule as to calling men to work overtime? Say "Yes" or "No" first. A. Yes.

Q. State whether or not it is customary to call a man fifteen minutes before he is wanted to work overtime? A. In the watch below, yes.

Q. State whether or not the officer in command, or the first mate, told you that he shifted your hours of employment from five to five, or some other way than from six to six shift? A. No, sir.

Q. Mr. Gilbert, did you refuse to go to work when the mate ordered you on deck? A. No, sir.

Q. What was the only thing that you were trying to clear up?

A. Well, I only wanted an understanding—five o'clock was not my regular time to go to work, and I wanted an understanding.

Q. Understanding as to what?

A. Well, what he wanted. He came down first of all and he started to give me a calling down for not being on, he started "Why aren't you on watch at five o'clock?" And I hadn't been called or never told to go on watch. And it is only necessary, you want some explanation.

Q. Mr. Gilbert, state whether or not you know what the custom and the practice is, on other boats, that is, in regard to watchmen working from six to six? A. Yes, sir; that is—

Q. (Interrupting): Just a minutes. State whether or not you know that custom— A. Yes.

Q. (Continuing): —and that practice. Now, was the custom on the steamship "Seward" the same as on other ships? A. Yes.

MR. BOGLE: I object to that, Your Honor. He has testified that he signed shipping articles, and they specify his hours, and he was working under those shipping articles. If he was working under a written contract, it is immaterial.

THE COURT: I think the shipping articles would control where there is a provision made in the shipping articles.

Q. (MR. WIENIR): Now, when you went on deck the first night, did you see a man named Hagen, I believe it was, who was watching anchor—on the anchor watch at that time? A. Yes.

Q. (MR. BOGLE): What night was this?

MR. WIENIR: This was on the night of October 3rd.

Q. (MR. WIENIR): And what were Hagen's duties, state, if you know?

A. Well, a man standing anchor watch, he looks after the safety of the ship, looks that the ship don't drag her anchor, and looks after the anchor lights, and if the fog comes up he looks after the fog bell.

Q. After you were discharged, what did you do?

A. Well, I went up town and got a room.

Q. That is in Juneau?

A. Yes, at the Circle City Hotel, and I stayed there, and I tried to make arrangements to get back to Seattle here, and I asked several of the mates if I could get a job. I asked the mate of the "Redondo" if I could get a chance to work my way back to Seattle or get a job, and I asked the mate on the "Admiral Farragut," and the mate on the "Princess Sophia," I asked the captain of the "Princess Sophia" also, and the mate of the "Spokane."

Q. How long did you stay in Juneau?

A. About eleven days.

Q. And how did you get back to Seattle?

A. I paid my fare to Seattle.

Q. And since your arrival in Seattle, have you tried to get other employment? A. Yes.

Q. Tell the court where you tried to get employment since that time?

A. Well, I tried on the steamer "Alki" and—

MR. BOGLE: If the court please, it seems to me if this is proper at all the period of time within which he tried to get employment should be limited to the duration of this particular voyage.

THE COURT: Make your objection.

MR. BOGLE: Yes, I object to it on that ground.

Q. (MR. WIENIR): From the time that you arrived in Seattle until the steamship "Seward" returned, where did you try to get employment?

A. Well, I tried to get on the steamer "Alki" here in Seattle, and on the steamer "Kansas City," that is two of the ships that I went around and asked the mate, but I had other opportunities to go to work on ships that were going away a long distance, like the "Minnesota" and another ship going to the west coast of South America, the "Edna" and some schooners.

Q. Now, Mr. Gilbert— A. Those opportunities came up—they send for a man to the Union hall. And have their name on a list there and the highest man on the list he gets first chance to ship. So I had an opportunity to ship several times, but I could not go

because I wanted to be around here for this case when it would come up.

Q. Mr. Gilbert, how much did you spend, what was the fare money in coming down from Juneau to Seattle? A. \$16.

Q. And about how much did it cost you to live from the time you were discharged until the steamship "Seward" reached Seattle, November 9th I believe it was, or November 8th or 9th, of 1915, about how much a day did it cost you?

MR. BOGLE: I object to that, if the court please, as being not a proper item of allowance. My understanding of the rule is that if a seaman is improperly discharged during the course of the voyage, he is entitled to his wages to the end of that voyage, together with his expense of returning home, in a foreign port. Now, this was not a foreign port, and the items he is going into now are for some twelve days that he claims he spent in Juneau.

THE COURT: I will hear the evidence and determine later what application shall be made.

MR. WIENIR: If the court please, at this time I should like to introduce in evidence a certified copy of the wages that were paid on the steamship "Seward" on that particular trip, certified to by the shipping commissioner, for the purpose of showing what the wages were that were earned by men who were getting \$50 a month and at the rate of overtime that the libellant here was getting.

THE COURT: Is there any objection?

MR. BOGLE: I shall object to that, if the court please, on the ground that he was working under a specific contract of \$50 a month, and this court has heretofore held in such cases, as to allowance of wages, that he would only consider the contract rate—I think that is the decision of Judge Hanford—and that the matter of overtime was purely speculative and not to be taken into consideration. What another man might have made in overtime is no criterion of what this watchman might have made in overtime. I do not think the Federal Statutes make any allowance for that. They make allowance for the payment of his

wages to the end of the voyage, not for extra services in the nature of overtime.

MR. WIENIR: Your Honor, the wages which this man contracted for were \$50 a month and 50 cents per hour overtime.

Q. (MR. WIENIR): State whether or not that is correct?

A. Yes. All overtime I worked I got 50 cents an hour overtime.

MR. WIENIR: The overtime is just as much a part of the wages as the salary or wage of \$50.

THE COURT: What do you want to show by this?

MR. WIENIR: I want to show, Your Honor, that Mr. Gilbert had an opportunity to get overtime more than many of the men who were employed on that ship, and that he is entitled to show what he would average on the overtime, the average amount of overtime which other men working in like capacity were earning on that ship.

THE COURT: Put it in and we will determine about the materiality of it later.

MR. WIENIR: I offer this.

Paper referred to was marked libellant's exhibit "A."

MR. WIENIR: Your Honor, that record will speak for itself.

THE COURT: Oh, yes.

Q. (MR. WIENIR): You allege that you were damaged in the sum of \$500? A. Yes, sir.

Q. Tell the court what your damage consists of in that respect?

A. Well, it is not very nice to get fired there, up there in Juneau, and, another thing, you must be put ashore or something like that for something very serious, I understand.

MR. BOGLE: I can't hear.

A. (Continuing): And they have something against you.

THE COURT: Speak that way. Then I can hear and they can hear.

A. They have something against you, they have got something against you, like that, something serious, and leave you there in Juneau, and tends to give you a bad character, and causes lots of steamship companies not to want your services.

Q. (MR. WIENIR): And were your feelings damaged, did you feel badly because of the fact that you were forcibly discharged? A. Yes.

CROSS EXAMINATION

Q. (MR. BOGLE): You had made one previous voyage on the steamer "Seward," Mr. Gilbert?

A. Yes.

Q. And upon her return to Seattle you stayed by the ship? A. Yes.

Q. And that voyage was made at a prior period of the year, in the summer, was it not?

A. Yes, the trip before this.

Q. During that trip what hour in the evening did it get dark?

A. Well, it got dark earlier down here than it did up north probably.

Q. Well—

A. So when we were going up in the summer it was later and when we were coming back down it was earlier.

Q. About what time would it get dark in the vicinity of Juneau and north in July and August?

A. Well, I was not there in July or August.

Q. You left here on the previous trip in July, didn't you? A. Yes.

Q. Northbound? A. Yes.

Q. You returned in September? A. Yes.

Q. So you were on that voyage in July and August, weren't you?

A. We didn't go to Juneau, though.

Q. Well, out to the westward, up to Cordova and Seward? A. Oh.

Q. Was it dark at five o'clock?

A. Oh, no. That is the trip—

Q. Was it dark at six o'clock? A. No, no.

Q. On this particular voyage, when you left here on September 27th, it got dark much earlier, didn't it?

A. Oh, yes.

Q. It was dark before six o'clock, wasn't it?

A. Where?

Q. Well, at Juneau?

A. Well, it was getting dark.

Q. Had you ever shipped before as a watchman?

A. Yes.

Q. On what vessels? A. Well, on the "Capalino."

Q. That is a little small Canadian boat, is it?

A. That is, yes; and for a few days on the "Ca-moosa."

Q. You have been a seaman here three years, you say? A. Over three years, yes, sir.

Q. This certificate which you have testified to was obtained in October after this trouble had taken place, wasn't it, you didn't have that certificate at the time you were employed by the steamship "Seward?"

A. I got that on the experience I have had previous to that time I had been discharged on the "Seward."

Q. Yes, but you didn't have that at the time?

A. No, sir; I didn't have it at the time. You didn't have to have one.

Q. You got it after this trouble had occurred, did you?

A. Oh, yes, but I got it on the experience that I had previous to this trouble.

Q. Yes; and the fact that you had had this trouble did not prevent you from getting the certificate in any way, did it? A. Oh, no. No.

Q. Now, Mr. Gilbert, you say that your hours of employment were from six p. m. to six a. m. Were those hours fixed by your shipping articles?

A. I don't know. I never saw it in the shipping articles. I made that agreement with the mate when I shipped—Mr. Bloomberg—and Mr. Robblee told me to go to work the same as before on the second trip; that is after I had been away from the ship two days.

Q. Did Mr. Robblee mention the specific hours 6 p. m. to 6 a. m.? A. No, he didn't.

Q. Now, in testifying as to your duties as a watchman, I don't think you said anything about looking after the lights, did you? A. What is that?

Q. As watchman aboard this ship, what were your duties with reference to the ship's lights?

A. Well, if they wanted any lights put up, the officer of the watch would tell me to put the lights up, or else sometimes I put the lights up myself, because I know the—I was on watch and he would want the lights up anyway, so it was only a question of time for him to come and tell me to put up the lights anyway.

Q. It was a part of your duties at the time to put up lights?

A. Yes, when you get an order you usually have to carry out the order.

Q. You have been a seaman for three years and you know that it is necessary to put up these lights and that it is your duty to put them up, don't you?

A. Which lights?

Q. The running lights, the anchor light, when you are up in there.

A. Whoever gave order to put up the lights.

Q. It is not a specific part of your duty then?
(No response.)

Q. As a matter of fact, isn't it part of your duty and understanding up there that you are to put up the lights, whatever lights are necessary, prior to the time when it is dark?

A. Well, yes, if you are at anchor, or something like that, sometimes they will tell you, coming to anchoring, to get your anchor lights out, or else whatever lights they want out; it is customary.

Q. Now, on this particular evening when the trouble occurred, or, rather, prior to that evening, had you had any trouble with the mate or the captain? A. Prior to October 3rd?

Q. October 3rd, yes? A. Or 4th?

Q. Prior to October 3rd, had you had any trouble with eiether the mate or the captain?

A. Well, I never had any trouble with the captain at all. Of course the mate had used some abusive language to me more than once.

Q. Prior to that time had he? A. Yes.

Q. Still he was the mate who interceded in your behalf with the captain when he, you say, was angry, when you missed the ship for two days?

A. He told me he would. I don't know if he did. He said—

Q. He fixed it up, didn't he?

A. If he didn't want me he only could say "You are finished" because he hired and discharged them.

Q. He did that, didn't he?

A. Well, I don't know. He said he would.

Q. You so testified, anyway. Now, you say that it was about a quarter of six when you met the mate?

A. Yes, about a quarter to six.

Q. At that time you didn't have your working clothes on? A. I was only partly dressed.

Q. And it was dark, wasn't it?

A. No, I would not say it was dark.

Q. You were down below at the time, weren't you? A. At the time of this argument?

Q. Yes. A. Yes.

Q. Were the lights lit? A. Which lights?

Q. The electric lights below, 'tween decks?

A. Yes, they were—that is, after 'tween decks. It is darker down 'tween decks than it is outside, though, on top deck.

Q. You were not outside, though. Now, didn't he ask you at that time why you didn't have your lights up? A. No, sir.

Q. Did he at that time mention or say anything about lights? A. No, sir.

Q. Not during the course of the argument at all?

A. Not during the course, no, sir.

Q. And the whole argument was about you not being at work at five o'clock, was it?

A. He came down and he says, "Why aren't you

on watch at five o'clock?" And I told him it was not six o'clock. I looked at my watch—he asked me why I was not on watch, rather, and I told him it was not six o'clock. "Well," he says, "you are supposed to be on watch at five o'clock in port," and I told him that I was not supposed to be on watch at five o'clock, six o'clock was the time, and he says, "You are supposed to go on watch at five o'clock." "Well," I says, "all right, I will go on watch at five o'clock, but" he says—I says, "it will mean an hour overtime for me, that is all the difference it makes to me." He says, "Overtime be God damned," he says, "you go on watch at five o'clock," he says, "or I will put you off, ashore, at Juneau." This was on Taku Inlet. So I told him he couldn't kid me that way because I was too familiar with the duties of a watchman. "Well," he says, "I am mate aboard this ship," he says, "and I am going to be mate aboard the ship, and I will show you." So away he goes up the stairs then and left me.

Q. That was the time when he told you to go on watch at five o'clock or he would put you ashore, wasn't it?

A. He says, "You are supposed to be on watch at five o'clock." He didn't tell me to go on, because it was a quarter to six then and he could not very well tell me to go on watch at five o'clock that day, and then he had ordered me ashore before I had a chance to go on watch at five o'clock the next day.

Q. Well, I understand that, but your dispute was as to whether or not you were entitled to overtime if you went on watch at five o'clock?

A. He was going to put me ashore first thing and I—

Q. I say, that is what your dispute was about, as to whether you were entitled to overtime, wasn't it, if you went on watch at five o'clock?

A. Anything like that, if it is not overtime, you can have that settled later on, but he was going to put me ashore.

Q. Wasn't that what the dispute was about, Mr. Gilbert? A. That was partly, yes.

Q. Wasn't that solely what it was about?

A. Well—

Q. You say you told him that you would go on watch if he paid you overtime, and he said—

A. I didn't say "if." It would mean overtime, I said it would mean overtime for me.

Q. And he told you there would be no overtime and if you didn't come on watch he would put you ashore, didn't he?

A. "Overtime be God damned," he says, "you will go on watch at five o'clock or I will put you on shore at Juneau." We were in Taku Inlet at that time.

Q. Didn't Mr. Robblee order you to put up the anchor light— A. No.

Q. —at that time?

A. No, not that time, no, sir.

Q. Didn't you tell him you would not put up the anchor light, or, if you did, you would be entitled to overtime? A. No.

Q. And didn't he expressly order you to put up the anchor light? A. No.

Q. Didn't he say to you, "Do you refuse to put up the anchor light before six o'clock when it is dark?"

A. No, I never said—refused to put no anchor light.

Q. Didn't you answer that you did refuse unless you got overtime?

A. We were talking about the overtime. We didn't go that far about lights.

Q. (THE COURT): Let me ask: Did you go to work after that at five o'clock?

A. I could not very well, sir, because it was 5:45 then.

Q. (THE COURTS): Well, after that?

A. I was ordered ashore in the meantime the next day.

THE COURT: Oh.

MR. BOGLE: At that time, if the court please, they were at I think a little place where there is a cannery—wasn't it, Mr. Gilbert?

THE COURT: I understand that is near or at Juneau, when they met.

THE WITNESS: Yes, sir.

MR. BOGLE: Some little landing there and he was discharged when they arrived at Juneau, was put off.

THE COURT: All right.

Q. (MR. BOGLE): Now, you say that Mr. Robblee gave you certain orders after this argument?

A. Yes.

Q. And according to your testimony, Mr. Gilbert, this argument never reached a climax where you were ordered to do certain work or quit, it never reached that point, did it?

A. He says he would put me ashore in Juneau, and left me there, so I went along and—

Q. He would put you ashore in Juneau if you didn't do what?

A. He says, "You will turn to at five o'clock," he says, "or I will put you ashore in Juneau," and I told him he could not kid me that way. "Well," he says, "there is no kid about that," he says, "I am mate aboard of the ship and I am going to be mate aboard the ship."

Q. (THE COURT): What time did you go to work previous to this, between there and Seattle and after you left Seattle?

A. Six o'clock, 6 p. m. to 6 a. m.

Q. (MR. BOGLE): And on this night the vessel was at anchor, wasn't she? A. Yes.

Q. Lying where, at Taku Inlet?

A. Yes, Taku, or Annex Creek, something like that.

Q. And it was raining, a dark nasty night, wasn't it?

A. It was kind of a hazy night. It was not what you would call a real clear night. It seems to me it was raining a little bit, I am not absolutely positive.

Q. Wasn't it blowing quite hard?

A. No, I don't remember of its blowing very hard.

Q. Do you remember the ship having some trouble holding her anchorage, dragging her anchors there, on account of the force of the wind?

A. I remember they had a man there watching for ice flowing down—the ice floes, but as far as dragging anchor—didn't drag any anchor while I was on watch from six o'clock that evening until the next morning. She might have dragged her anchor before that, or she might have dragged the next morning after I went off watch.

Q. On this same night of October 3rd, after the argument with the mate, what did you do, Mr. Gilbert?

A. Well, I went on and I put up electric light forward—electric anchor light, and then put up an oil one aft, and I put some clusters around the deck where he told me to put them and—

Q. Where he told you to put them after this argument? A. Yes, this was after.

Q. After the argument, you met him again on deck? A. Yes, sir; after.

Q. I want you to be pretty sure.

A. About half past seven, something like that.

Q. About half past seven.

A. No, it was not electric clusters, it was lanterns, coal oil lanterns. The hatches were off and there was only a very narrow space to walk along, and there was a lot of lashings where the things were lashed, and they had those lights so that they could see on the deck.

Q. And you say you put out both the riding lights, did you?

A. I put out both those. There was one out there at the time, an electric—an electric one, so I took that one down—not electric, coal oil, and I took that coal oil lamp down.

Q. When you first came out and attempted to go on watch that night, didn't you meet Mr. Robblee on deck forward? A. Forward?

Q. At the lamp room door, where they keep the lamps? A. No, I don't remember meeting him.

Q. You went to the lamp room, didn't you?

A. Oh, yes, I would have to go, to get lights.

Q. Do you remember seeing some one there in the lamp room?

A. There was one fellow, Bill, I don't know his other name, quite an elderly man with a gray mustache, he was putting up the forward riding light in the rigging, when I went forward he was putting that up there.

Q. Didn't you see Mr. Robblee at that time?

A. No, I don't remember seeing him.

Q. Didn't you see Mr. Robblee at that time, and didn't he tell you that you need not bother about the lights, that he had a man fix them already?

A. That was the next day at Juneau.

Q. You are sure of that, are you? A. Yes.

Q. Were you putting out your anchor lights at Juneau?

A. Oh, no, it was not anchor—I was not putting no anchor lights the next day, and it was not at the oil room either that he told me that the next day at Juneau. We were at the city dock, I think it was, in Juneau, and—

Q. City dock, and what were you doing, getting lights at the city dock?

A. I was not getting lights out at the city dock.

Q. I asked you if he didn't tell you that you need not mind about the lights, that he had another man to put them up? A. That night, no, not October 3rd.

Q. Did he on October 4th?

A. Yes, he told me, he says, "You need not go to work tonight," on October 4th.

Q. No, I say about the lights, telling you you need not bother about the lights, that he had another man to put them up? A. No, he didn't.

Q. He didn't do that?

A. He didn't tell me, no. In Juneau he told me I need not go to work, though—"Need not turn to" he says.

Q. He told you that, did he?

A. Yes, he says, "You need not turn to." Well, I told him I had been working already. "Well," he says, "you haven't been," and I says "I have," I says, "go down ask the third mate," I says, "he saw me fixing the lights down there in the hold."

Q. That was about—after seven o'clock, wasn't it? A. This—

Q. When this conversation took place?

A. In Juneau?

Q. Yes. A. Yes.

Q. Hadn't he called you into his room that afternoon and made out your pay check? A. Yes.

Q. And told you that you were through and discharged? A. Yes.

Q. So that you knew that when you went on watch at six o'clock that night?

A. Well, the way I looked at it—

Q. You knew that, didn't you?

A. —he was not in the right in discharging me, in doing that, and that is why I went to work.

Q. I say, he had discharged you, made out your pay check and told you to go to the purser and get your money, that afternoon, hadn't he?

A. Yes, he did.

Q. And that pay check was correct for your wages up to that time, wasn't it?

A. Up until I was discharged.

Q. That was correct? A. That was correct.

Q. And you refused to take that? A. Yes.

Q. And you refused to quit? A. Yes.

Q. And it was that night that you told him that you would not go ashore unless he put you ashore?

A. I told him I would not go ashore because—well, he says "I will put you ashore," he says, "when we get ready to go," he says, "I will put you ashore," he says, "you can sleep in your room tonight," he says, "but I will lock it up tomorrow," he says, and he says, "we will put you ashore before we go away from here."

Q. Did he use any force putting you ashore?

A. Yes, he caught me by the arm and put me ashore.

Q. You didn't resist any?

A. I didn't—I did, yes. I didn't make a fight, though, or nothing like that, but I resisted.

Q. Isn't it a fact that when he put his hand on your arm you said, "That's all I wanted, I just wanted you to put your hand on me"—isn't that correct?

A. No, I didn't, no.

Q. Why did you want him to put you ashore?

A. Well, he could order me ashore, and I didn't know what he could put in the log book or anything like that.

Q. (MR. WIENIR): What is that, Mr. Gilbert?

A. He could—if I went ashore, I don't know, probably he could put I deserted the ship or something like that, I don't know what could have been put in the log book against me, so—

Q. That is what you were thinking about?

A. So if he wanted to put me ashore, well, he could put me ashore, forcibly, but I was not going to go ashore, because I didn't consider that right, because I had always tried to do the best I could there.

Q. Now, you testified that you tried to get work on the "Kansas City?" A. Yes.

Q. When was that?

A. Well, it was—I think it was the day after she came here from San Francisco.

Q. And what month?

A. Let's see, that is about—I think it would be somewhere about the last of September or first—let's see—I can't tell you the exact date. It was the day after—she came here Sunday morning, and this was Monday morning, the next day.

Q. You think that was before the 9th day of November, do you? A. Oh, yes.

Q. The "Kansas City" is owned by the same company, isn't she—the Alaska Steamship Company?

A. The Alaska Steamship Company.

Q. Mr. Gilbert, you didn't consider that your reputation had been injured to any great extent, if you thought you could get a job with the same company, did you?

A. Well, I didn't know, so I went down to see. I didn't get—

Q. The "Kansas City" and the "Alki" are the only two vessels you tried to get position on?

A. In Seattle here?

Q. Yes.

A. Of course there were other jobs I could have had, but they were going away a long distance, and I wanted to be here for when the case came up in court, if I could.

Q. And you turned down other employment so that you could be here? A. Yes.

Q. And you have already given your deposition in this case, haven't you? A. Yes.

Q. Didn't you testify in that deposition that the only work—the only ship you tried to get any employment on, after your return to Seattle, was the “Alki?”

A. I did, but I had forgotten about the “Kansas City.”

Q. You had forgotten about the “Kansas City?”

A. Yes.

Q. That question was asked you several times and you positively stated that the “Alki” was the only one; isn't that right?

A. Yes, I said—that is correct, I told him the— I said the “Alki” was the only one, at the time. I don't know if I said it more than once or not, but I said it.

Q. And the “Alki,” you tried to get employment—it was only a few days before you testified before, wasn't it? A. Just a few days, yes, sir.

Q. And you testified before on November 23rd, didn't you? A. Well, I don't remember the date.

Q. Well, the deposition, in connection with other depositions taken on the same date, shows this testimony was taken on November 23rd.

THE COURT: Was this in this same matter?

MR. BOGLE: Yes, he testified, and Mr. Wienir is putting him on instead of putting in the deposition. He has already given his deposition.

THE COURT: Proceed.

Q. You stated you stayed at Juneau for twelve days?

A. Eleven days, I think it was, eleven and got away on the twelfth.

Q. And how did you get the money to get out?

A. I got it from the bank there. I had a deposit in Seattle here, so I went to a bank there in Seattle—in Juneau, and I happened to have my pass book with me and it was marked up to a few days before we left Seattle, so he gave me the money, that is, the cashier of the bank.

Q. And you got the money by drawing a draft on your bank? A. Yes.

Q. And this item of \$500 damages is for damages to your reputation?

A. Yes, I claim to reputation and—

Q. You have no specific damage, have you, you haven't been kept out of any employment, have you?

A. Well, not that I know of, I—

Q. It didn't prevent you from getting your certificate as A. B. seaman, did it?

A. Well, this—let's see, this kept me out of going on the "Minnesota" and some of those steamers, the "Edna" or—

Q. The only thing that kept you out of that was your desire to be here until this suit was finished, wasn't it?

A. Oh, yes, I see, yes, sir; I see what you mean now, yes.

Q. It was not the fact that you got discharged that kept you from it.

A. Yes, I see what you mean now.

MR. BOGLE: Attached to this original deposition is a copy of an agreement between the Sailors Union of the Pacific and the Shipping Association, which I would like to use in connection with Mr. Gilbert's testimony. I did before, when he gave his deposition. I think we can consent that this deposition be opened.

MR. WIENIR: Why? What do you want to do with that?

MR. BOGLE: I want to ask him some questions about that.

MR. WIENIR: Your Honor, I object to that unless they want to put that agreement in evidence,

and we certainly will object to that agreement being put into evidence.

MR. BOGLE: It is in evidence now.

MR. WIENIR: Well, Your Honor—

THE COURT: I do not want to read that deposition and listen to this testimony too. I do not want to take the time, consume double time in trying the case.

MR. BOGLE: No, but the exhibit that I now want is attached to his deposition and the deposition of these other witnesses.

MR. WIENIR: That is a copy of that agreement, if you want to offer it in evidence.

MR. BOGLE: It puts me in an embarrassing situation, because I have assumed right along that—

THE COURT: The agreement can be used for any purpose that is proper in this case—

MR. WIENIR: Oh, yes.

THE COURT: —detached from that deposition. The deposition cannot serve any purpose now.

MR. BOGLE: Well, I will use that in connection with another witness, if Your Honor please.

THE COURT: How is that?

MR. BOGLE: I will, I say, use that agreement in connection with another witness.

THE COURT: All right.

REDIRECT EXAMINATION

Q. (MR. WIENIR): Mr. Gilbert, did you have any serious trouble with the mate previous to October 3rd, 1915?

THE COURT: He testified to that, I think. He said that he called him certain names sometimes.

THE WITNESS: And swore at me, the like of that.

THE COURT: Yes.

Q. (MR. WIENIR): Did you refuse to do your duty at any time when he commanded you?

A. No, sir.

MR. BOGLE: We are not claiming that he ever refused duty or was disobedient to orders except this one time. I do not think that is proper.

Q. (MR. WIENIR): Why did you say, "If you want to put me ashore, all right, put me shore?"

THE COURT: Oh, I think you have covered that. It would appear to take up time unnecessarily.

Q. (MR. WIENIR): This money that you got from the bank, why did you wait eleven days in Juneau until you got this—until you worked your way back to Seattle?

MR. BOGLE: I object as immaterial, if the court please. A. Well, I thought—

MR. BOGLE: It can't make any difference why he waited there.

THE COURT: Let him answer.

A. Well, I didn't know I could get money there from my account in Seattle until I would make a draft and send it to Seattle and have it certified and come back again to Juneau, so I tried to get out on some steamer in the meantime.

RECROSS EXAMINATION

Q. (MR. BOGLE): You are a member of the Sailors Union of the Pacific, Mr. Gilbert? A. Yes, sir. (Witness excused.)

P. BARING, produced as a witness on behalf of Libelant, and having been first duly sworn, testified as follows:

MR. WIENIR: If Your Honor please, I took the deposition of this man at a time when I believed he would not be able to be present here. By good luck he was able to be here and I—

THE COURT: Now, gentlemen, I didn't undertake to hear a whole house of witnesses here, I took this up as an emergency matter. If your testimony is in deposition, then there is no real reason why we should take the time of the court in going over it again.

MR. WIENIR: Well, that is all right to us, we are willing to submit it in deposition.

THE COURT: If depositions are taken, there is no use taking the time of the court in going over it again.

MR. WIENIR: All right.

THE COURT: In view of the fact that our time is very limited.

MR. WIENIR: The rest of our case, Your Honor, will be presented by means of depositions we have taken.

THE COURT: How many depositions are there?

MR. WIENIR: Well, there are the depositions of three witnesses, I believe.

MR. BOGLE: Besides Mr. Gilbert.

THE COURT: All right. Proceed.

LIBELANT RESTS

THE DEFENSE

MR. BOGLE: I would like to use the exhibit, in connection with the testimony of Mr. Gill, attached to the deposition.

THE COURT: All right. Swear the witness and detach it.

P. B. GILL, produced as a witness on behalf of Respondent and Claimant, having been first duly sworn, testified as follows:

THE COURT: The deposition, I understand, to which that agreement is attached, will not be used.

MR. WIENIR: No.

THE COURT: And it may be opened and the agreement detached for such use as may be proper upon this trial.

MR. WIENIR: There is a portion of the depositions that will be used. This is all in one hearing. There are five witnesses. Their testimony was taken at one hearing.

THE COURT: Oh, well, then the depositions may be published, but the testimony of the claimant will not be considered.

Q. (MR. BOGLE): Your name, Mr. Gill?

A. Yes, sir; P. B.

Q. And what is your business?

A. My business, for the Sailors Union of the Pacific of Seattle.

Q. (THE COURT): What?

A. The business agent for the Sailors Union of the Pacific, at Seattle.

Q. (MR. BOGLE): And you are here upon subpoena which we issued for you? A. Yes, sir.

Q. How long have you been such agent?

A. Since November, 1895.

Q. You were such agent, then, on May 29, 1913?

A. Yes.

Q. Now, I will hand you this pamphlet, respondent's exhibit "1," and ask you what that is, Mr. Gill?

A. That is the agreement entered into between the Puget Sound Shipping Association and the Sailors Union of the Pacific.

Q. Is the Alaska Steamship Company a member of the Puget Sound Shipping Association?

A. It was at that time represented.

Q. It was at the time of this dispute in 1915 too, wasn't it?

A. I presume so. Of course I have no way to know personally. I assume they are.

Q. Don't you know that they are?

A. They might have parted company, for all I know.

Q. Well, you know, as business agent, that they have not parted company, don't you?

A. I have an idea that they are still a member of the Association.

THE COURT: That is the Alaska Pacific?

MR. BOGLE: No, Alaska Steamship Company this is, if the court please.

Q. (MR. BOGLE): That agreement is the working agreement agreed to by the shipping companies belonging to the Association, and the Sailors Union, isn't it? A. Yes, sir.

Q. And they are mutually bound by the terms of this agreement—the members of the Union and the members of the Association, aren't they?

A. Yes, sir.

Q. Do you furnish the seamen with copies of these, or in any way make them familiar with the terms of this agreement?

A. We always have several hundred copies printed for their benefit.

Q. Now, what is the usual method of disposing of disputes as to overtime?

A. Well, there is a clause in the agreement that reads that if there is any doubt what shall be considered as overtime, the matter shall be taken up between the Union and the owners, for adjustment. That is there in a general way. It was not inserted in the agreement, by the way, to absolutely gag a man's mouth when he is away. Ordinarily, naturally a man will have dispute with the mate, and that can be done in a proper manner.

Q. I understand that. I am just asking you if that is in there? A. Yes, that clause is in there.

Q. I understand you are a member of the Sailors Union, of which the libelant is a member?

A. That clause is in there.

Q. That clause is that "Members shall use their best judgment at all times and if in doubt what shall be charged as overtime, shall do the work required of them and then refer the case to the Union for adjustment." Isn't that frequently done, don't you adjust these disputes of overtime very frequently?

A. Very frequently.

Q. You are very familiar with that agreement, aren't you? A. I think so.

Q. Is there any stipulation or article in there providing that a watchman shall work from 6 p. m. to 6 a. m.? A. There is not.

Q. That is all right. A. A watchman—

Q. That is all I asked, Mr. Gill. That is all.

CROSS EXAMINATION

Q. (MR. WIENIR): Mr. Gill, are you acquainted with the practice in the various ships as to what the regular hours of employment of watchmen are?

MR. BOGLE: I object to that, if the court please, as not being proper cross examination. I examined this witness for the specific purpose of identifying this agreement, showing that that was in effect and was binding upon both parties. Now, any outside understanding is not proper cross examination.

THE COURT: He may answer.

Q. (MR. WIENIR): State whether or not you know that practice?

A. The general practice with watchman, after they leave Seattle, is from six to six. In Seattle, particularly when cargo is not handled and everybody leave the vessel at five o'clock, then the watchman in many cases goes to work at five o'clock and stay on until seven in the morning; but the general practice is from six to six when they are running, when somebody is always on deck. There may, however, be a few exceptions, I don't know.

Q. (MR. WIENIR): Mr. Gill, if a mate desires to switch hours of employment, does he generally notify the seaman that his hours of employment are changed?

MR. BOGLE: That is objected to as entirely immaterial.

THE COURT: Sustained.

Q. (MR. WIENIR): Mr. Gill, if a mate desires to call a man to work overtime, is it the custom to allow a certain time in which the man may come aboard ship?

MR. BOGLE: Objected to as immaterial.

A. I didn't catch that.

MR. BOGLE: This witness has not shown that he has ever been on that run or knows anything about the practice aboard ship.

THE COURT: Sustained.

Q. (MR. WIENIR): What is the purpose of that clause of the agreement that you just cited?

MR. BOGLE: I think it speaks for itself, if the court please. It is a binding contract.

A. The purpose is to—

MR. WIENIR: Just a minute.

THE COURT: I think the shipping articles, if there are shipping articles, and I understand there are, perhaps will govern the trial and dispose of that.

MR. WIENIR: Very well. I think that will be all, Mr. Gill.

MR. BOGLE: I have a copy of the shipping articles, that I got from the shipping commissioner.

THE COURT: Is there any objection?

MR. BOGLE: This is an official document.

THE COURT: I understand there is no objection.

MR. BOGLE: It is a part of his official document, and he requested that I return them to him, and he holds my receipt for them. I will let counsel look at that, if he desires. It does not provide any hours of work for watchmen. Do you want to go into that?

MR. WIENIR: No, I have no objection to that.

MR. BOGLE: I do not want to introduce them in evidence, because I have to return them; but it does not provide any.

THE COURT: Any hours?

MR. BOGLE: For watchmen.

MR. WIENIR: For watchmen.

THE COURT: Yes. Is there anything else that you desire to call the court's attention to in the shipping articles?

MR. BOGLE: One clause, if the court please—this clause:

“And the said crew agree to conduct themselves in an orderly, faithful and honest manner, to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats or on shore, and in consideration of which service to be duly performed the said master hereby agrees to pay the crew,” and so forth “his wages.”

THE COURT: Proceed.

F. W. ROBBLEE, produced as a witness on behalf of Respondent and Claimant, and having been first duly sworn, testified as follows:

Q. (MR. BOGLE): Your business, Mr. Robblee? A. Chief officer of the “Seward.”

Q. How long have you been a seaman?

A. Since the 7th day of September, 1887.

Q. How long have you been in this run to south-eastern and southwestern Alaska?

A. I was in it about two years and a half some years back, and I am in it now going on six months at the present time.

Q. You were the chief officer on the trip leaving here about September 27th? A. I was. .

Q. Did you employ Mr. Gilbert in the first instance?

A. I reemployed him after he had been adrift for a couple of days.

Q. (MR. WIENIR): I can't hear you.

A. I say, I reemployed him after he had been adrift for a couple of days, yes sir.

Q. (MR. BOGLE): Did you at that time say anything to Mr. Gilbert about his hours of work?

A. No, I didn't say anything at all to him. I thought he understood his business well enough to attend to it himself.

Q. You employed him as night watchman?

A. Night watchman.

Q. What are the duties of a night watchman?

A. The duties of a night watchman is to inspect the ship when she is running and report to the bridge if there is any fires, cargo adrift, lights out, or anything like that, or anything going wrong fore-and-aft of the ship; put his riding lights up when the vessel is lying at anchor in an open roadstead or at anchor in port; also to keep a fire in the galley, call cooks—several little things like that.

Q. When the vessel is at anchor, what hour is he supposed to put the riding lights up?

A. It all depends on sunrise and sunset, that is what our law calls for—sunset and sunrise.

Q. Calls for anchor lights when you are at anchor at sunset, doesn't it?

A. That is the United States law.

Q. And is it the duty of anyone else aboard the vessel to put out her anchor lights when she is at anchor?

A. Not customary on any vessel. The watchman

puts his lights up, and it is not his duty to take them down on short winter mornings, when it is eight or nine o'clock, some of the deck hands, quartermaster or somebody takes it down. It is his duty to put it up, invariably.

Q. Is it customary for the watchman to wait for orders every night or on every occasion?

A. I never heard of it before, awaiting orders for riding lights. Of course cargo lights, it is customary for the mate to tell him what lines he wants the lights in for the gangs he is going to work at night, yes.

Q. In the summer time, when the days are long, when does the night watchman come on?

A. Well, he is generally around about six o'clock; he is around all night. He has no lights to put up, then, when he is up north.

Q. Later, in the fall and winter, is it dark in Alaska by 5:30 at night?

A. It is dark—oh, yes, well dark, 5:30; it is dark at five o'clock in October up there.

Q. On such nights, what do you do about your lights when you are at anchor?

A. The watchman puts the riding light up, the anchor light up, always; never have to tell him about it.

Q. He puts it up at five o'clock, six o'clock?

A. He puts his lights up, if he knows his business, yes.

Q. Had you ever given this watchman, Gilbert, orders, at any previous time, about putting up lights?

A. On cargo lights only, because I never bothered about an anchor light except, occasions going to anchor unexpectedly, I would tell the watchman to have his lights ready. He never objected previous to that. We didn't do much anchoring.

Q. On this particular night, the night in question, where were you anchored?

A. Annex Creek.

Q. And what kind of a night was it?

A. Dark, rainy, blowing a gale of wind.

Q. And what time did it get dark that night?

A. Well, it was getting dark at a quarter past

five. We anchored about ten minutes to five. Started discharging at five o'clock.

Q. And did you have any trouble holding your anchors there?

A. Yes, we were dragging a bit. The next morning we had to get out of there, on account of dragging.

Q. Of course, being at anchor, you didn't have any running lights out?

A. No, the running lights were not out.

Q. Were there any lights aloft? A. No.

Q. To indicate the position of your ship?

A. No, nothing except what were shining in the deck house.

Q. Were you in a position—lying in a location where there was any danger from other vessels or other craft?

A. Well, there was danger, yes; there was lots of other boats that could come there. There was none in there that night. The "Santa Ana" was in Juneau at the time, as it happened. Gas boats and everything else.

Q. When did you first notice, on this night, that the anchor lights were not up?

A. I would not be sure of the time, but I would judge it was about ten or fifteen minutes past five when we got started with the cargo.

Q. And what did you do when you found that out?

A. I went for the watchman.

Q. And just—

A. Met him in the athwartship alleyway, coming from the mess room, and I asked him why he wasn't on watch. He said he didn't have to go on watch. I said, "What's the matter with your anchor light?" "Well," he says, "I don't have to put up any light before six o'clock, without overtime." And, "Well," I says, "You will do as you are told around here, Gilbert, or you will hit the beach." He says, "Don't kid me like that, old-timer; I am too old in the game," and I just simply told him it was no kidding.

Q. Did you order him to put out his anchor light?

A. I asked him then, right then and there in the

alleyway, I says, "Do you absolutely refuse to put up a light before six o'clock without overtime?" And he looked and stammered for a minute, he says, "I do." I said, "All right." I went forward and knocked off one of the men and put him down to get a light up. In a few minutes Gilbert came forward—

MR. WIENIR: I didn't quite catch that last answer.

A. I went forward and got a sailor to put the riding light up. Didn't want the watchman any more; I wasn't stuck for a watchman at all.

Q. (MR. BOGLE): You got another man to put out the riding light. A. I did.

Q. Did you see Gilbert—

A. He came forward to the lamp room, and I was there, I says, "You needn't bother with the lights, this man will put them up." If he done anything after I left the deck, he done it on his own initiative, I didn't need him; plenty of men there.

Q. Did you give him any further orders that night?

A. I gave him no further orders until the next day, in Juneau, when I put him ashore, as he said.

Q. Why didn't you discharge him at that point, Mr. Robblee?

A. Simply to keep control of the ship. There has got to be somebody have authority to say who is going to run it.

Q. What I meant was, why didn't you put him ashore where you were lying at the time that this occurred?

A. Well, because I didn't have the heart to put a dog on the rocks there in the rain there.

Q. You waited until you got to Juneau the next day. Mr. Robblee, as first officer aboard this ship, do you have general charge of the handling of cargo?

A. I have—

Q. Direct charge of the crew?

A. Direct charge of the crew and discharging and loading cargo, under the master's orders.

Q. How much of a crew did you have aboard the "Seward?" A. I have nine men and a watchman.

Q. Nine seamen?

A. Well, there was two—I forget whether there was two or three winch drivers that trip.

Q. Were all hands working cargo at the time of this dispute between you and Mr. Gilbert?

A. Everybody was working cargo, yes.

Q. And why did you discharge him, Mr. Robblee?

A. Discharged him because he refused to do what he was told. If there was any dispute about the overtime, it was up to him to put it down, any dispute. We would have done the same and referred it to the agent and the company when we got back to Seattle. I have had no further trouble with overtime since then.

Q. Did you have anything further to do with Mr. Gilbert that night, on the 3rd? A. I did not.

Q. You arrived in Juneau the next day, did you?

A. How?

Q. You arrived in Juneau the next day?

A. The next afternoon. I am not sure just what time we arrived. We had to get out of there on the following morning, we couldn't hold our anchors.

Q. When did you first see Gilbert the next day, at Juneau?

A. The next day at Juneau, I would not be positive what time when I saw him first. I didn't pay any further attention to him. He was out of my books then, you know; I offered him his check, the next day, and he says, "That's no good to me."

Q. That is what I was getting at. When did that take place?

A. Oh, I don't know just what time, I think it was in the afternoon, probably two or three o'clock, I would not be sure of the time. I didn't make a memorandum of it.

Q. It was before seven o'clock in the evening, wasn't it?

A. Oh, well, it was sometime in the afternoon. I don't know just what time it was I called him. He was there in the forenoon. He came aboard. I sent word

I wanted to see him, or I went after him myself, I forget which.

Q. And you offered him his pay?

A. I offered him his time-check.

Q. And he refused to take it?

A. He said it was no good to him.

Q. I wish you would just state what took place along about seven o'clock that evening when Mr. Gilbert—

A. Nothing only he came forward with his jumper and his cap on, and I told him he was finished and he would stay finished, that was all.

Q. Well, did you put him ashore forcibly?

A. I says, "You will have to go ashore," and he says, "I won't go ashore unless you put me there." "Well," I says, "I will put you ashore. You can sleep in your room tonight, if you want to, but," I says, "I will put you ashore before we leave." I am not sure whether he slept aboard that night, or not, but, anyhow—

Q. Did you use any force in putting him ashore?

A. Well, at last I didn't know what he meant by saying, "Unless you put me ashore," I thought maybe he was going to start something; I said, "We won't have no rough stuff about it." I took him by the arm. He says, "That is all I want, just touch me, just so you put me ashore." He got his clothes and went.

Q. Did you make any entry in your official log book in reference to this discharge?

A. No, I made it in the bridge log, and the purser makes that entry there and he signed it, under my directions, yes—under captain's directions, rather.

Q. You are required to make such entries, are you not, and file the official log—

A. Not in the official log. Well, under the direct supervision of the master.

Q. You signed that?

A. I signed it as a witness, that is all.

Q. And such an entry is required to be made and filed with the Commissioner?

A. That is supposed to be filed with the Commissioner.

Q. As the official record.

MR. BOGLE: This is another official document, if the court please. I would like, if Mr. Wienir will consent, just to read the entry into the record.

THE COURT: You may proceed.

MR. BOGLE: This entry appears in the official log book:

"October 4, 1915. Juneau, Alaska. A. Gilbert, watchman, was discharged for refusing to put out anchor light at Annex Creek October 3 before six p. m., without overtime. He refused to take time-check, and was put ashore. (Signed) J. Johnson, master. F. W. Robblee, mate."

THE WITNESS: Correct.

Q. (MR. BOGLE): That is the correct entry, is it, on this official log?

A. That is the official log of the ship, yes, with the Shipping Commissioner at the present time.

Q. When was that entry made?

A. That was made on the 4th—whatever date it is dated, made and signed then and there.

Q. On that date. Now, there is a similar entry in your—

A. Just simply a memorandum that he refused to put up the anchor light before six o'clock, without overtime. That is all I put in. I didn't have time to go into details.

Q. Now, who did you employ to take Mr. Gilbert's place?

A. His name was Roberts, I think E. Roberts, if I remember right.

Q. Did you get him at Juneau?

A. I got him in Juneau, yes.

Q. He is the man who appears on here as watchman?

A. He is there, signed on the 5th or 6th, I don't remember which.

Q. E. Roberts, watchman. Amount cash received on this settlement \$64.05. That is his final wages?

A. That is for the balance of the voyage up or down, yes.

CROSS EXAMINATION

Q. (MR. WIENIR): Mr. Robblee, when did you receive your promotion to first mate?

A. Which promotion do you mean—

Q. I mean what position did you occupy on the trip previous to this last one, the one that Mr. Gilbert was on the first time? A. I was third mate.

Q. You were third mate at that time? A. Yes.

Q. When were you promoted to the position of first mate?

A. 24th of last September, I think it was, something like that.

Q. State whether you have had a little trouble with the men in pulling them around and bluffing them and so on?

A. I haven't. No bluffing about it at all. You can't go around with ping pong nets and get anything done.

Q. Did you ever have any trouble with Gilbert before that time?

A. No sir, no more—I don't know of any trouble, I can't imagine what he means. I might have said, "What the hell is the matter with you?" Or something like that, but as far as any trouble, we never had any arguments between—he was away for a couple of days, I just decided down on the ship then we would forget it, and took him back again. I don't hold no grudge against the man.

Q. What time did you first see Mr. Gilbert when you went down in the afternoon of the 3rd of October?

A. About a quarter past five, as near as I can remember, something like that neighborhood, I don't remember particular. I am too busy to take my watch out every minute.

Q. What question did you ask Gilbert?

A. I asked him why he wasn't on watch. He said he didn't have to be before six o'clock. I says, "What the hell is the matter with your riding light?"

Q. When did Mr. Gilbert quit the previous morning?

A. I don't know. He is supposed to go off at six

o'clock. He calls me or calls the other man, whoever it is, myself or somebody.

Q. What hours had he been working up to that time, up to October 3rd?

A. He had been making various hours. For nearly the trip before he didn't have to get up any lights—sometimes at one o'clock, I guess he did have them up a few mornings one o'clock in the morning, a couple of hours. He might not have done that. He was around there.

Q. During all hours. You mean that he was paid overtime when he worked all hours?

A. I don't mean anything of the kind. The watchman is not allowed to get overtime and we are not allowed to call him unless we are pressed badly for help. There is a circular letter out to that effect—from the company, to that effect.

Q. What hours did Mr. Gilbert work the first trip, the time you were third mate on the ship?

A. I don't know. It was none of my business whatever.

Q. What hours did he work on the second trip, the one that this trouble occurred in?

Q. Well, I don't know as he worked any. He was properly from six to six, because we were running, but when we got to anchor he was the fellow to put up the anchor light.

Q. Did you ever tell him his hours were changed?

A. Never told him they were changed, no, but I supposed—he was supposed to be on duty at five o'clock.

Q. Did you tell him to be on duty at five o'clock that day?

A. No, I didn't. I told him he was supposed to be on deck, if it came to a sundown, at five o'clock; that is what I told him, which was quite correct.

Q. At the time that Mr. Gilbert said "Yes, I will go on deck if you allow an hour overtime to me," what did you say?

A. I could not remember. I might have said "To hell with the overtime. Do what you are told," or

something of that kind. I haven't time to choose my words when I have got fifteen or twenty men working and work going on, and a gale of wind blowing and no lights out.

Q. What did Mr. Gilbert persist in doing when you said you would give him no overtime?

A. Well, it would have been no more to it only there was several of the rest of the crew there and so on, and when I says, "Do as you are told or you will get on the beach," he says, "Hold on old-timer, you can't kid me like that; I know too much about the game," or words to that effect.

Q. What did you do?

A. That is enough for me. When a man goes that far with me, me or him gets off the ship, that's all—one of the two of us.

Q. What kind of lights have you on the ship?

A. We have all lights—electric lights, candles and coal oil.

Q. What kind are your running lights?

A. We have electric and oil both.

Q. How long does it take to switch on your electric lights, Mr. Robblee?

A. According to how quick a man can throw the switch.

Q. Isn't it a fact that various officers of the ship did that sort of thing when it got dark, that they just simply turned the button on and the lights were on?

A. It is not a fact for an anchor light. The anchor lights are detachable, and the running lights are permanent fixtures.

Q. What about the running lights?

A. The running lights are masthead light and the side lights and stern light.

Q. And isn't it a fact that the watchman does not do that sort of thing until he is commanded to by the officer in charge?

A. No, not if he knows his business. I never heard tell of telling a watchman putting up a riding light, I never heard tell of such a thing.

Q. What are the watchman's duties?

A. To get up his riding lights, keep the fire for the cook, and look wise, mostly.

Q. Now, at the time that you wanted to put Mr. Gilbert ashore, did he resist you, did he say "No, I don't want to go ashore?"

A. He says, "You have got to take hold of me to put me ashore," he says, "that is all, just touch me and I will go." That is all he said.

THE COURT: They have both been over that and I think I understand just what took place there without taking up the time cross examining upon that.

MR. WIENIR: I just want to ask one question.

THE COURT: Proceed.

Q. (MR. WIENIR): As far as you know, Mr. Gilbert was anxious to go to work that night, wasn't he—that night after you discharged him?

A. I don't know whether he was anxious or not. I told him he was not going to work, and he was not going to work.

Q. Answer my question. A. I don't know.

Q. Answer me whether according to your idea, Mr. Gilbert was ready and willing and wanted to go to work and did go to work that night?

A. He could not go to work, that is all there is about it. His personal intention has nothing to do with me. When I am mate of the ship—and I am mate of it—when I tell him he is done he is done.

Q. Don't get so hot, but answer the question. Is it a fact or is it not a fact that Mr. Gilbert, after you discharged him, persisted in staying on the ship and did—. A. Yes.

Q. (Continuing): —and did actually— A. Yes.

Q. (Continuing): —actually go to work that evening?

A. He did actually not go to work. I stopped him before he started. If he did, he done it on his own—

Q. Well, now, I am not asking that.

THE COURT: I think I understand the situation entirely.

MR. WIENIR: If Your Honor please, I want to show that my man here was—

THE COURT: I understand the situation.

MR. BOGLE: They have both given their versions of it.

THE COURT: Proceed. I have got the version of both sides.

Q. (MR. WIENIR): So, as far as you knew, Mr. Gilbert worked from six to six until October 3, 1915? A. He was around from six to six, yes.

Q. Well, he was around from six to six?

A. He had nothing to do all summer. We turned to at four o'clock in the morning and all night—

Q. You didn't tell him that his hours of work were changed?

A. Is he such a nut that he don't know that the sun goes down in the winter time earlier than it does, up north, in the summer? He is supposed to know that.

REDIRECT EXAMINATION

Q. MR. BOGLE): That anchor light, Mr. Robblee, is a detachable light, and where do you have to fix it?

A. It has to be plugged and histed up in the rigging or in the stay; I forget whether we had it on the stay or on the rigging. You have to put a plug in and take it down out of the way unless you are on the long stay. Is that all?

(Witness excused.)

JOHN JOHNSON, produced as a witness on behalf of Respondent and Claimant, and having been first duly sworn, testified as follows:

Q. (MR. BOGLE): You are master of the steamship "Seward," are you? A. Yes, sir.

Q. And were in October, 1915? A. Yes, sir.

Q. At the time of this trouble between Mr. Robblee and Mr. Gilbert? A. Yes, sir.

Q. Captain, you didn't hear any portion of the conversation which took place between the two of them, did you? A. No, sir; I did not.

Q. Did the mate report the occurrence to you?

A. Yes, sir; mate came and told me that the watchman refused to put the anchor lights up.

Q. And what did you order?

A. I told him to put him off and put him on the dock as soon as we got to Juneau.

Q. Why did you take that stand, captain, why did you think it was necessary to discharge a man for that?

A. Oh, any time they give the officers any back-talk that way, on the ship, the ship is better off without anybody—

Q. Did you consider that your ship was in any dangerous position on that night as it was lying that night without anchor lights?

A. She is in dangerous place in any place to anchor, there was scows working back and forth and other ships possibly could come along there.

Q. It was a bad night, was it?

A. Black, raining night, yes, sir; blowing some.

Q. In case of dispute as to overtime, do you attempt to adjust that? A. No, sir.

Q. Or to settle that question?

A. No, sir. All I know about the overtime, if there is any disagreement about it up north, it is to be settled when we get to Seattle, decided between the Union and the company's officers.

Q. You make a notation of that and it is submitted— A. Yes, sir.

Q. (Continuing): —when you return here?

A. Yes, sir; any time there is any dispute about the overtime, they are supposed to do the work, and decide whether it is to be paid after we get to Seattle.

Q. Captain, in case of a disobedience of an order of this kind—you considered that a lawful order, did you, to put up the anchor light?

A. Sure, yes, sir. It is a customary thing, it is a necessary thing, it has got to be done.

Q. Now, captain, did you hear any portion of the conversation, or see anything that took place, at Juneau, at the time Gilbert was discharged?

A. No, sir; I didn't.

Q. Put over the rail?

A. No; I heard him have some argument with him, but I didn't see it before he went on the deck.

Q. Did you see the mate take him to the rail?

A. No, sir; I didn't see it.

Q. You didn't see him?

A. No, but the mate told me that he would not take his money.

THE COURT: I do not care what the mate told him.

MR. BOGLE: No. I think that is all.

CROSS EXAMINATION

Q. MR. WIENIR): Do you know of your own personal knowledge whether the anchor light was up or was not up that evening? A. Sir?

Q. Do you know—

MR. BOGLE: I didn't ask him that.

Q. (MR. WIENIR): Do you know, of your own personal knowledge, whether that anchor light was not up that evening?

A. Oh, no, I wasn't paying no attention to that.

Q. You don't know that of your own personal knowledge?

MR. BOGLE: No, he didn't testify to that.

Q. (MR. WIENIR): What did you say, Captain Johnson, when the mate told you that he had already discharged Gilbert? A. No.

Q. What did you say to Mr. Robblee?

A. I told him to put him off, to put him on the dock as soon as we got to Juneau.

Q. This was after the man had been put ashore?

A. No, sir.

Q. What did you tell Mr. Robblee?

A. I told him—he told me that the watchman refused to put the lights up. I told him to put him off, to put him on the dock as soon as we got to Juneau.

Q. What did you say after the man was put ashore?

A. I didn't say anything after he was put ashore.

Q. As a matter of fact, didn't you say, "We don't need a watchman anyway, let him go," or something to that effect?

A. Very likely; we don't need anybody that gives any back talk to the officers, watchman or no watchman. The ship is better off without them, we don't need them.

Q. Captain Johnson, of your own personal knowledge, do you know whether Mr. Gilbert has ever disobeyed any order?

A. No, sir. No, sir, I don't know anything about that. The officer handled all that part of it. It is the first time I heard anything about—

MR. WIENIR: If Your Honor please, if you will permit me to put Mr. Baring on the stand. He saw the anchor light was up at this particular time. Mr. Baring had an opportunity to see and did see the anchor light. Will you permit me to put him on the stand?

THE COURT: Proceed.

MR. BOGLE: When?

MR. WIENIR: On this particular occasion.

(Witness excused.)

REBUTTAL.

P. BARING, produced as a witness on behalf of LIBELANT, in REBUTTAL, and having been first duly sworn, testified as follows:

Q. (MR. WIENIR): Just state your name.

A. Baring.

Q. Mr. Baring, you gave your testimony in a deposition, on November 23, 1915, did you not?

A. Yes, sir.

Q. I just want to ask you one question: On the day that this trouble arose between the mate, Robblee, and Gilbert here, the seaman, do you know whether or not the anchor light was up at that time?

A. Yes, the anchor light was up. They put an oil light up first, and soon Gilbert came on deck and took it down and put the electric light up, because that light was too low at the time, he put it up higher.

Q. Who did that work, who put that anchor light up there at that time, Mr. Baring?

A. Well, Bill. I don't know his last name. Bill was his name. He put it up first, but it was only 12

feet high. It is supposed to be 20 feet high. Gilbert took it down again and put an electric light up.

Q. Do you remember the condition of the weather that day or that evening? A. Yes, it was raining.

Q. It was raining? A. Yes, sir.

Q. And was the boat rocking back and forth?

A. No.

Q. Or in imminent peril or something of that sort? A. No, sir, it was not.

Q. Did anything seem to be in danger?

A. Well, the ice was floating, it was a strong tide running, but there was a man on anchor watch.

Q. Was he looking for ice?

A. Yes, he was watching for ice.

CROSS EXAMINATION.

Q. (MR. BOGLE): Just a minute. What time was it that you saw this anchor light up?

A. Well, it was about a quarter to six.

Q. A quarter to six?

A. Yes, when Bill put it up, the other fellow—the oil light.

Q. And do you happen to know what time this conversation took place between the mate and Mr. Gilbert? A. Well, I didn't hear no conversation.

Q. You don't know whether that anchor light was up when they were having the conversation, or not, do you? A. Well—

Q. Well, do you?

A. I know from what I was told, yes.

Q. Well, we don't care what you were told.

A. I heard that he had an argument with the mate—

Q. I don't care what you heard. You were the winch driver, weren't you? A. Yes, sir.

Q. You were working where, forward?

A. Well, I was not on the winch at the time, I was just hoisting up—

Q. And you had been up there since five o'clock, hadn't you? A. Well, I was there about four o'clock.

Q. And you saw this anchor light about a quarter of six? A. About a quarter of six, yes.

Q. And that is all you know about it, isn't it?

A. That is all I know, that the anchor light was up.

(Witness excused.)

TESTIMONY CLOSED.

United States of America, Western District of Washington, Northern Division.—ss.

I, JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, and the judge before whom the above entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing transcript of testimony and proceedings are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein.

I do further certify that the same contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein.

I do further certify that the foregoing transcript contains all of the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony, and all motions, offers to prove and admissions, except the depositions of Oliver Woolhouse, Cezar Curty and P. Baring, on behalf of libelant, on file herein and hereby made a part of the record herein; and that libelant's exhibit "A" and respondent's exhibit "1," on file herein, are all the exhibits introduced upon the trial of said cause.

Done in open court this 26th day of June, A. D. 1916.

JEREMIAH NETERER,
Judge.

Indorsed: Testimony and Proceedings. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 26, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

MEMORANDUM DECISION

Libelant was employed as night watchman on board the Steamship Seward, September 25, 1915. No hours of employment were specified in the shipping articles. On a previous trip on the same vessel his hours were from six P. M. to six A. M. He understood the same hours applied upon the trip in issue, and he was on duty from six P. M. to six A. M., from the time the vessel left the port of Seattle, until the controversy arose some days later. On October 3rd, while preparing to "turn to" his watch at 5:45 P. M., the first mate asked him, "Why aren't you on watch." Libelant replied, "It isn't six o'clock yet," to which the mate replied that it didn't make any difference, he was supposed to be on watch at five o'clock, to which libelant replied, in substance, that it would mean an hour overtime for him. There was some further conversation between libelant and the mate, in which the mate asked libelant whether he would not work unless given overtime, and libelant said he would not, or words to that effect; but proceeded to enter upon the discharge of his duties. He was discharged and taken from the vessel on its arrival at Juneau, Alaska, the following day. The mate tendered to libelant the amount of wages earned to the time of discharge, which the libelant refused. Libelant remained at Juneau, Alaska, for the period of ten days before securing return passage to Seattle. His fare from Juneau to Seattle was \$16.00. He has brought this action to recover the wages for the trip, expenses necessarily incurred to return to Seattle, and \$500.00 damages.

No hours of employment were mentioned in the shipping articles. The agreement between the Puget Sound Shipping Association, of which claimant is a member, and the Seafarers' Union, of the Pacific, of which libelant is a member, provides that the hours of regular seamen shall be from seven o'clock A. M. to five o'clock P. M., with one hour off for lunch, and further provides that the work outside of these hours, "except such work as is necessary for the immediate safety of the vessel or passengers, cargo and crew,"

shall be paid for as overtime. The agreement further provides that quartermasters, stationmen, and watchmen, when working, shall perform their regular duties without charge for overtime, and provides the hours of such employment to be from seven A. M. to five P. M. These hours manifestly do not apply to night watchmen. Section 13 of this agreement provides, "Members of the Sailors' Union shall use their best judgment at all times, and if in doubt as to what shall be charged as overtime, shall do the work required of them, and then refer the case to the Union for adjustment." The conduct of the libelant in this case does not indicate that the language employed expressed his real intention except as a claim under Section 13, *supra*, as he immediately "turned to" his work and remained aboard the ship until his discharge, at all times manifesting his willingness to do his duty. The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors' Union of the Pacific, and the hours of six to six having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service; nor mutinous or rebellious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him. I think the libelant should recover his wages for the trip, the \$16.00 fare expended, and \$35.00 to reimburse him for the outlay which was occasioned at Juneau, Alaska.

A decree may be prepared.

JEREMIAH NETERER,
Judge.

Indorsed: Memorandum Decision. Filed in the U. S. District Court, Western District of Washington, Northern Division, January 28, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

DECREE.

This cause came on to be heard on the 10th day of January, 1916, and testimony of witnesses for the respective parties being heard and considered by the Court, it was required by the Court that the parties hereto should submit briefs therein; and briefs having been submitted, and the same read and considered by the Court, and the Court being fully advised in the facts, the law, and the premises,

IT IS NOW THEREFORE ORDERED AND DECREED that the libelant herein have and recover his wages for the trip in question in the sum of \$74.79 and \$16.00 for fare expended in returning to the terminal port, and \$35.00 to reimburse him for expenses occasioned by his enforced stay in Juneau, and together with the sum of \$20.00 for attorney's fees in this action, and his costs and disbursements herein.

Done in open court this 28th day of February, 1916.

JEREMIAH NETERER,
Judge.

Copy of within Decree received this 26th day of February, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant.

Indorsed: Decree. Filed in the U. S. District Court, Western District of Washington, Northern Division, February 28, 1916. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

MEMORANDUM OF COSTS AND DISBURSEMENTS.

Disbursements.

	Amount Claimed.	Amount Allowed.
Clerk's fees	\$ 8.10	\$ 8.20
Marshal's fees	4.12	4.12
Attorney's fees	20.00	20.00
Fees for taking of depositions.....	7.50	7.50
Master in Chancery's fees.....
Reporter's fees, trial	2.50	2.50
Cost of reporting depositions.....	5.00	5.00
Transcript of above, 220 fol. at 15c....	31.80	12.00
Allowed by Court	19.80
Witness Fees—		
Woolhouse, Oliver, address unknown, 1 day and 2 miles.....	3.10	3.10
Curty, Cezar, address unknown, 1 day and 2 miles	3.10	3.10
Berning, P., address unknown, 1 day and 2 miles	3.10	3.10
Gilbert, Arthur J., Seattle, Wash., 1 day and 2 miles.....	3.10
Total	\$91.42	\$88.42

Taxed March 10, 1916.

FRANK L. CROSBY, Clerk.

By ED M. LAKIN, Deputy Clerk.

United States of America, Western District of Washington.—ss.

Eimon L. Wienir being duly sworn, deposes and says: That he is the Proctor for the Libelant in the above entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

Subscribed and sworn to before me, this 1st day of March, 1916.

ED M. LAKIN.

Deputy Clerk U. S. District Court, Western District of Washington.

Indorsed: Memorandum of Costs and Disbursements. Filed in the U. S. District Court, Western District of Washington, Northern Division, March 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

OBJECTIONS TO COST BILL.

Comes now the Alaska Steamship Company, claimant above named, and objects to the following items contained in the libellant's proposed cost bill:

I.

Claimant objects to the allowance of the sum of Seven and 50/100 Dollars (\$7.50), as proctor's fees for taking depositions, and objects to the allowance of any sum in excess of Five Dollars (\$5.00), upon the ground that all of the witnesses whose depositions were taken were produced in open court, with the exception of two witnesses, whose depositions were introduced in evidence.

II.

Claimant objects to the allowance of the sum of Thirty-one and 80/100 Dollars (\$31.80), as the cost of original transcript of depositions, 220 folios at 15 cents, and objects to the allowance of any sum for original transcript of depositions in excess of Twelve Dollars (\$12.00), for the reason that the entire transcript of such depositions does not exceed 212 folios, of which 132 folios cover the depositions of witnesses Gilbert and Bering, who were produced in open court as witnesses in this cause, and therefore no charge can be made for transcribing their depositions.

III.

Claimant objects to the allowance of any witness fee to libellant, Arthur J. Gilbert.

ALASKA STEAMSHIP COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE.

Its Proctors.

Indorsed: Objections to Cost Bill. Filed in the U. S. District Court, Western District of Washington, Northern Division, March 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

MEMORANDUM DECISION.

It appears that the libelant took the testimony of one of his witnesses who is a seaman about to sail, in good faith, upon the belief that he would not be present when the cause was tried. The ship in which this witness sailed arrived in the city during the time the cause was being tried or just prior to it being tried, and the witness was called instead of his deposition read. The libelant has taxed the costs of the deposition, and the claimant has moved to retax and disallow the costs.

The claimant has cited *The Persian*, 158 Fed. 912; *Barnardin v. Northall*, 83 Fed. 241; *Cahn v. Monroe*, 29 Fed. 675; *Cahn v. Gung Wah Lung*, 28 Fed. 396; *Lamb v. Stone*, 28 Mass. 526. These cases, I do not think, throw any light upon this issue. In *The Persian*, Judge Hough simply held that an attorney's fee for taking a deposition was not chargeable where the deposition was not offered in evidence, and the same holding was made by Judge Baker in *Barnardin v. Northall*, and in *Cahn v. Monroe*, it was held that a witness called, and testifying, but not subpoenaed, was entitled to his per diem.

I think it would be manifestly unjust not to permit costs, where a party takes a deposition in good faith, though the necessity for the taking is eliminated at the time the cause is called for trial and the witness is presented in court for oral examination, direct and cross, rather than reading the deposition, and this view is sustained by *Nead v. Millersburg Home Water Co.*, 79 Fed. 129, and also by the Supreme Court of California, in *Lomita Land & Water Co. v. Robinson*, 97 Pac. 10, 18 L. R. A. (NS) 1106.

I think the costs for deposition should be allowed.

JEREMIAH NETERER,

Judge.

Indorsed: Memorandum Decision. Filed in the U. S. District Court, Western District of Washington, Northern Division, March 20, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

NOTICE OF APPEAL.

To the Clerk of the above Court, to Arthur J. Gilbert, Libelant in the above entitled cause, and to Eimon L. Wienir, Proctor for said Libelant:

You and each of you will please take notice that the Alaska Steamship Company, claimant in the above entitled cause, hereby appeals from the final decree made and entered in said cause on the 28th day of February, 1916, and from each and every part of said decree, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the City of San Francisco, State of California.

Dated at Seattle, Washington, June 6, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Alaska Steamship Company, Claimant.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 6, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

ADMISSION OF SERVICE OF NOTICE OF APPEAL.

Service of notice of appeal by Alaska Steamship Company, claimant in the above entitled cause, and a true copy thereof, received and admitted this 6th day of June, 1916.

EIMON L. WIENIR,
Proctor for Libelant.

Indorsed: Admission of Service of Notice of Appeal. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 6, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ORDER FIXING THE AMOUNT OF BOND ON APPEAL AND STAY OF EXECUTION.

A decree having been made and entered in the above entitled cause on the 28th day of February, 1916, wherein and whereby it was ordered and decreed that the libelant have and recover his wages for the voyage

mentioned in the pleadings, in the sum of Seventy-four 79/100 Dollars (\$74.79), also Sixteen Dollars (\$16.00) for fare expended in returning to the terminal port, and Thirty-five Dollars (\$35.00) to reimburse him for expenses occasioned by his enforced stay at Juneau, as mentioned in the pleadings, together with the sum of Twenty Dollars (\$20.00) for attorney's fees and his costs and disbursements in the said action incurred; and the said Alaska Steamship Company, claimant in said action, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit by filing in the office of the Clerk of the above entitled court and serving upon the proctor for the libelant a notice signed by its proctors that it appealed from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit; and the said Alaska Steamship Company, claimant as aforesaid, desiring to stay execution of the said decree and having by its proctors of record moved this court to fix by order the amount of the bond which it should file as a bond on appeal staying the execution of said decree; and the Court being of the opinion that a bond in the sum of Seven Hundred Dollars (\$700.00) is sufficient upon such appeal as a cost bond and to operate as a supersedeas to stay execution of said decree;

NOW, IT IS HEREBY ORDERED AND DECREED that the appeal bond to be given on such appeal be and the same is hereby fixed at the sum of Seven Hundred Dollars (\$700.00), which bond shall operate as a supersedeas in said cause.

Done in open court this 6th day of June, 1916.

JEREMIAH NETERER,
Judge.

O. K.—E. L. WIENIR, Proctor for Libelant.

Indorsed: Order Fixing the Amount of Bond on Appeal and Stay of Execution. Filed in the U. S. District Court, Western Division of Washington, Northern Division, June 6, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, ALASKA STEAMSHIP COMPANY, a

corporation, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business in the State of Washington, as surety, are held and firmly bound unto ARTHUR J. GILBERT, libellant in the above entitled cause, in the sum of Seven Hundred Dollars (\$700.00), lawful money of the United States, to be paid to the said Arthur J. Gilbert, for which payment well and truly to be made we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, this 7th day of June, 1916.

WHEREAS, the said Alaska Steamship Company, a corporation, principal herein, has appealed to the next United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered in the above entitled court on the 28th day of February, 1916; and

WHEREAS, the said Alaska Steamship Company, a corporation, principal herein, and claimant in the above entitled cause, desires during the process of such appeal to stay the execution of said decree; and

WHEREAS, the said Court has heretofore fixed the amount of the bond on such appeal in order to stay the execution of said decree;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that if the above named Alaska Steamship Company, a corporation, appellant in said cause and principal herein, shall prosecute said appeal to effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in the above entitled cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit to the above entitled court, then this obligation shall

be void, otherwise the same to be and remain in full force and effect.

(Seal) ALASKA STEAMSHIP COMPANY,

By W. H. Bogle, Vice-President.

AMERICAN SURETY COMPANY OF NEW YORK,

By S. H. Melrose, Resident Vice-President.

Attest: Forest Le Barry, Resident Asst. Secretary.

Approved:

JEREMIAH NETERER,

U. S. District Judge.

O. K.—E. L. WIENIR, Proctor for Libelant.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

NOTICE OF FILING SUPERSEDEAS AND COST BOND.

To ARTHUR J. GILBERT, Libelant in the above entitled cause, and to Eimon L. Wienir, his Proctor:

You and each of you will please take notice that on the 7th day of June, 1916, the Alaska Steamship Company, claimant in the above entitled cause, filed a bond for costs and damages on appeal herein in the sum of Two Hundred Fifty Dollars (\$250.00), and a supersedeas bond for stay of execution in the sum of Four Hundred Fifty Dollars (\$450.00), both in one bond pursuant to an order of the above court, in the office of the Clerk of the above entitled court, a copy of which bond is herewith served upon you.

You are further notified that the name of the surety on said bond is American Surety Company of New York, said surety having an office and resident agent in the Hoge Building, Seattle, Washington.

Dated at Seattle, Washington, this 7th day of June, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant.

Service of the foregoing notice and receipt of a true copy of the bond therein mentioned is hereby acknowledged, this 9th day of June, 1916.

EIMON L. WIENIR,
Proctor for Libelant.

Indorsed: Notice of Filing Supersedeas and Cost Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 13, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ASSIGNMENT OF ERRORS.

Now comes the Alaska Steamship Company, claimant and appellant in the above entitled cause, and alleges that there is manifest and material error in the records, acts and proceedings of the District Court in the above entitled cause, and more particularly assigns for error the following:

I.

That the Court erred in decreeing that the libelant have and recover his wages for the voyage mentioned in the libel.

II.

That the Court erred in decreeing that the libelant have and recover his fare expended in returning to the terminal port.

III.

That the Court erred in decreeing that the libelant have and recover his expenses incurred by his enforced stay in Juneau.

IV.

That the Court erred in allowing the libelant costs and an attorney's fee for deposition taken but not used. Dated this 26th day of June, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Claimant and Appellant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 26, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ORDER DIRECTING TRANSMISSION OF ORIGINAL EXHIBITS ON APPEAL.

Now, on this 26th day of June, 1916, upon application of Messrs. Bogle, Graves, Merritt & Bogle, proc-

tors for claimant and appellant herein, and for sufficient cause appearing;

It is ORDERED that the Clerk of this Court certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit the original exhibits used and introduced in evidence upon the trial and hearing of this cause, there to be inspected and considered, together with the transcript of the record on appeal from this cause.

JEREMIAH NETERER,
United States District Judge.

O. K.—E. L. WIENIR, Proctor for Libelant.

Indorsed: Order Directing Transmission of Original Exhibits on Appeal. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 26, 1916. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO ORIGINAL EXHIBITS.

United States of America, Western District of Washington.—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the attached documents constitute all the original exhibits introduced and received in evidence and used upon the hearing and trial of the above entitled cause, as follows:

Libelant's Exhibit "A,"

Respondent's Exhibit "1,"

which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the transcript of the record on appeal in the above entitled cause; said exhibits being transmitted pursuant to the order of the said District Court, so directing.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 12th day of July, 1916.

(Seal)

FRANK L. CROSBY,
Clerk U. S. District Court.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above Entitled Court:

You will please prepare, print and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above entitled cause, pursuant to the rules of said Circuit Court of Appeals upon the appeal heretofore perfected in this court, and include in the said Apostles the following pleadings, proceedings and papers on file, to-wit:

1. All those papers required by Section 1 of Paragraph 1, Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

2. All pleadings and exhibits including:

(a) Libel of Arthur J. Gilbert.

(b) Claim and answer of Alaska Steamship Company.

3. The testimony of Oliver Woolhouse, Cezar Curty, and P. Bering, taken by deposition on November 23, 1915, in pursuance of the stipulation of proctors, and filed on the 10th day of January, 1916; and the testimony of Arthur J. Gilbert and F. W. Roblee, taken in open court as certified by the judge and filed in your office on the 26th day of June, 1916.

4. Memorandum Decision, filed February 28, 1916.

5. Final Decree, filed February 28, 1916.

6. Cost bill of libellant.

7. Claimant's Objections to Cost Bill.

8. Memorandum Decision on Claimant's Objections to Cost Bill.

9. Notice of Appeal, with admission of service thereof.

10. Order fixing amount of bond on appeal.

11. Bond on Appeal showing Approval by the Court and Notice of Filing same.

12. Citation on Appeal, showing Service thereof.

13. Assignment of Errors.

14. Order Directing Transmission of Original Exhibits to the Circuit Court of Appeals.

14. Praeipie for Apostles on Appeal.

Dated at Seattle, Washington, this 26th day of June, A. D. 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Alaska Steamship Company, Claimant
and Appellant.

Indorsed: Praeipie for Apostles on Appeal. Filed
in the U. S. District Court, Western District of Wash-
ington, Northern Division, June 26, 1916. Frank L.
Crosby, Clerk. By Ed. M. Lakin, Deputy.

ORDER EXTENDING TIME.

Now on this 28th day of June, 1916, upon motion
of Proctors for Claimant, and for sufficient cause ap-
pearing, it is ordered that the time within which the
Clerk of this Court may prepare, certify and transmit
to the United States Circuit Court of Appeals the
transcript of the record in this cause be, and the same
is hereby extended to and including the 17th day of
July, 1916.

JEREMIAH NETERER,
District Judge.

Indorsed: Order Extending Time. Filed in the
U. S. District Court, Western District of Washington,
Northern Division, June 28, 1916. Frank L. Crosby,
Ed. M. Lakin, Deputy.

CLERK'S CERTIFICATE

United States of American, Western District of Wash-
ington.—ss.

I, Frank L. Crosby, Clerk of the United States
District Court, for the Western District of Washing-
ton, do hereby certify the foregoing pages numbered
from 1 to 98, inclusive, to be a full, true, correct
and complete copy of so much of the record, papers and
other proceedings in the above and foregoing entitled
cause, as are necessary to the hearing of said cause
in the United States Circuit Court of Appeals for the
Ninth Circuit, and as is called for by counsel of record
herein, as the same remain of record and on file in the
office of the Clerk of said District Court, and that the
same constitutes the record on appeal to the said Cir-
cuit Court of Appeals for the Ninth Circuit from the

District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Claimant and Appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return, 346 folios at 15c	\$ 51.90
Certificate of Clerk to transcript of record, 4 folios at 15c60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
Statement of cost of printing said transcript, collected and paid	136.36
	<hr/>
	\$189.71

I hereby certify that the above cost for preparing and certifying record amounting to \$189.71, has been paid to me by Messrs. Bogle, Graves, Merritt & Bogle, Proctors for Claimant and Appellant.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said district, this 12th day of July, 1916.

(Seal)

FRANK L. CROSBY,

Clerk U. S. District Court.

CITATION ON APPEAL.

The President of the United States, to Arthur J. Gilbert, Libellant in the above entitled cause, and to Eimon L. Wienir, his proctor, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal to the said

court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the Alaska Steamship Company is Appellant, and you, the said Arthur J. Gilbert, are Appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the Western District of Washington, Northern Division, in the above entitled cause, dated February 28, 1916, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 6th day of June, 1916.

JEREMIAH NETERER,

Judge of the United States District Court, Western District of Washington, Northern Division.

Due service of the foregoing citation is hereby admitted this 9th day of June, 1916.

EIMON L. WIENIR,

Proctor for Arthur J. Gilbert.

Indorsed: No. 3164-A. In the District Court of the United States, Western District of Washington, Northern Division. In Admiralty. Arthur J. Gilbert, Libellant, vs. S. S. "Seward," Respondent. Alaska Steamship Company, a corporation, Claimant. CITATION ON APPEAL. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 13, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, Owner and
Claimant of the Steamship "Seward,"

Appellant,

vs.

ARTHUR J. GILBERT,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,

Proctors for Appellant.

609 Central Building,
Seattle, Washington.

Filed

**United States Circuit
Court of Appeals**

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, Owner and
Claimant of the Steamship "Seward,"

Appellant,

vs.

ARTHUR J. GILBERT,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT

This is an appeal from a decree in admiralty of the District Court of the United States for the Western District of Washington, Northern Division.

The libel was filed by Arthur J. Gilbert against the S. S. "Seward" to recover wages and damages for an alleged wrongful discharge from employment as night watchman on that vessel.

The Alaska Steamship Company, owner of the S. S. "Seward," made claim thereto and filed its answer to the libel, justifying the discharge of the libelant on the ground of insubordination and disobedience to officers of the vessel.

The cause came on to be heard by the court below on depositions taken by stipulation of counsel and the evidence of witnesses produced in open court, and was argued by counsel on both sides.

The libelant regularly shipped as night watchman on board the S. S. "Seward" for a voyage from Seattle, Washington, to Anchorage, Alaska, and return to Seattle, at a monthly wage of Fifty Dollars (\$50.00). There were no hours of work for libelant specified in the shipping articles; but libelant's usual hours were from six P. M. to six A. M.

During the course of this voyage, while the vessel was lying at Annex Creek, Alaska, towards six o'clock of the evening of October 3, 1915, a dispute arose between the libelant and the mate of the vessel as to the duties of the libelant. The mate reprimanded the libelant for not having out the ship's lights and ordered him to put them out immediately; and the libelant denied his duty to do so before six o'clock P. M., and refused to do so unless paid overtime therefor. It does not appear that the libelant put out the lights that night; but the next day, October 4th, the vessel having arrived at Juneau, Alaska, the mate

tendered libelant the money due him as wages for the voyage to that port and discharged him. Subsequently, in the evening of that day, the libelant attempted to go to work as usual; but was prevented by the mate and finally left the ship.

It was the contention of the libelant in the court below that he was wrongfully discharged, in that he did not refuse obedience to the orders of the mate; or if he did hesitate about obeying them, he finally did perform his duties; and that his altercation with the mate was merely an endeavor to ascertain whether or not the mate intended to pay him overtime for working before six o'clock P. M., which was the hour when he usually put out the ship's lights.

On the other hand the steamship company contended that the libelant was insolent and disrespectful to a superior officer; refusing obedience to the mate's lawful commands and derelict in his duty; when the vessel was at sea; in a position of danger and necessarily depending upon the trustworthiness of libelant for her safety and the safety of those on board.

The court decided that the libelant did not intend to refuse obedience to the orders of the mate; that he was justified in assuming that his hours on duty were from six P. M. to six A. M. until otherwise notified and that the first intimation that his hours were changed would suggest extra time; that there was no showing of disqualification or unfitness for service; nor

mutinous, contentious or rebellious conduct; that the mate should have dealt with the libelant in a more indulgent spirit; that libelant should not have used the expression to his superior officer which he did; that there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime; and that the mate would not, under the circumstances, have the right to discharge him.

Thereafter a decree was entered that the libelant recover his wages; his fare in returning to Seattle, Washington; and his expenses while at Juneau, Alaska, the port of his discharge, together with a proctor's fee and costs of suit.

The libelant filed a cost bill to which claimant objected on the ground that it included a proctor's fee for taking depositions which were not used, the witnesses having been produced and examined in court; that it included an allowance for the cost of transcribing depositions which were not used, the witnesses having been produced and examined in open court; and that it included a witness fee for the libelant. The costs were taxed by the clerk, allowing the proctor's fee for taking depositions as claimed by libelant; disallowing the cost of transcribing depositions of witnesses afterward produced and examined in open court, and disallowing a witness fee to the libelant. An appeal was taken by the libelant to the court on the de-

cision of the clerk; which decision was sustained except as to the disallowance of the cost of transcribing the depositions of witnesses afterward produced and examined in open court; the court finding that such depositions were taken in good faith, though the necessity therefor was eliminated at the time of the hearing, and allowed the costs for such depositions.

From the foregoing proceedings and decrees the claimant has appealed and makes the following assignment of errors:

ASSIGNMENT OF ERRORS

1. The court erred in decreeing that the libelant have and recover his wages for the voyage mentioned in the libel.

2. The court erred in decreeing that the libelant have and recover his fare expended in returning to the terminal port.

3. The court erred in decreeing that the libelant have and recover his expenses incurred by his enforced stay in Juneau.

4. The court erred in allowing the libelant costs and an attorney's fee for depositions taken but not used.

QUESTIONS INVOLVED

The money damages decreed against the appellant by the court below are not sufficient to justify this appeal; as the non-taxable costs incurred in prosecuting

it exceed the pecuniary value to this appellant of a reversal of that decree.

We desire to impress upon this court that the real question involved is the authority of a ship's officers over members of her crew; the lightest limitation of which may have a far reaching effect and lessen the security of a vessel, her cargo and those on board.

The instant question, raised by the first three assignments of error, the decision of which involves this more important one, is whether or not the officers of a ship may properly discharge a seaman who neglects and fails in the duties for which he shipped and questions the propriety of the commands of his superior officer.

The second question, raised by the fourth assignment of error, involves a matter of practice and is argued here that the practice may be settled. It is whether or not a party to an admiralty suit is entitled to his disbursements for taking depositions which he did not use.

The argument of the appellant will be confined to a discussion of these two questions.

ARGUMENT

I.

THE LIBELANT WAS LAWFULLY DISCHARGED FOR INSUBORDINATION AND DISOBEDIENCE TO THE LAWFUL COMMANDS OF HIS SUPERIOR OFFICER.

(A) THE CONDUCT OF LIBELANT AMOUNTED TO INSUBORDINATION AND DISOBEDIENCE.

The libelant had shipped as night watchman, a position of much responsibility and trust. It was his duty to place the ship's lights, required by law as a measure of safety at sea; to keep watch over the anchorage and security of the ship in her berth; and to keep watch vigilantly over the ship and her cargo. (Apostles, pp. 14, 24, 30, 33, 50, 68.) Clearly a duty of the first magnitude and to be performed at a time when the officers and men would seek rest from the labors of the day, secure in the fidelity of this watchman.

Fidelity to duty is implied in every seaman's contract, and was expressly incorporated in the shipping articles signed by the libelant in these words, "and the said crew agree to conduct themselves in an orderly, faithful and honest manner, to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior

officers, in everything relating to the vessel, and the stores and cargo thereof, * * * ” (Apostles, p. 67.)

At the time of libelant's altercation with the mate, the ship was lying at or near Annex, or Sheep Creek, Alaska. It was the libelant's own testimony that it was getting dark and was raining. (Apostles, pp. 49, 54.) Mr. Roblee, the mate, testified that it was dark, raining and blowing a gale (Apostles, p. 69); and Mr. Johnson, the master, testified that it was a black, rainy night. (Apostles, p. 80.)

Under such weather conditions it was imperative that the ship's lights be out, as admitted by libelant (Apostles, p. 50); and testified to by the mate. (Apostles, p. 69.) It was part of libelant's duties to put out the ship's lights when necessary. (Libelant's testimony, Apostles, p. 50; mate's testimony, Apostles, pp. 69, 78.) Yet the libelant made no move to perform his duty until six o'clock P. M.

When accosted by the mate for his dilatoriness, as expressed in his own testimony, “So I looked at my watch and saw what time it was, it was still a quarter to six by my watch. So I told him it was not six o'clock yet, and he said, ‘six o'clock nothing,’ he says, ‘you are supposed to be on watch at five o'clock in port.’ I said my hours were from six to six, that is an agreement I made when I shipped; and he says, ‘you had better come on at five in port.’ I says, ‘alright I will come on watch at five o'clock in port,’ I says, ‘it

don't make any difference to me, only I have got an hour more overtime for it.' ” (Apostles, pp. 40, 52.) Or, as testified to by Oliver Woolhouse, mess-boy on the same voyage and a witness called by libelant, “He (the mate) came down about four o'clock in the afternoon and asked Mr. Gilbert why he was not on watch, and Mr. Gilbert told him he was not supposed to be there—to go on watch until six o'clock, and he told him he was supposed to go on watch when it was dark; and he told him his time was from six to six, well, he told him that he was supposed to go on at five o'clock. So they went on and he wanted to know whether he was going to not, and he told him no, he was not going unless he was going to give him an hour overtime which he said he was entitled to.” (Apostles, p. 10.) Or as the mate testified: “Met him in the athwartship alleyway, coming from the mess room, and I asked him why he wasn't on watch. He said he didn't have to go on watch. I said, ‘what's the matter with your anchor light?’ ‘Well,’ he says, ‘I don't have to put up any light without overtime.’ And, ‘Well,’ I says, ‘You will do as you are told around here, Gilbert, or you will hit the beach.’ He says, ‘Don't kid me like that, old-timer; I am too old in the game,’ and I just simply told him it was no kidding.” * * * “I asked him then, right then and there in the alleyway, I says, ‘Do you absolutely refuse to put out a light before six o'clock without overtime?’ and he looked and stammered for a minute, he says, ‘I do.’ I said, ‘all right.’ I went

forward and knocked off one of the men and put him down to get a light up." (Apostles, pp. 70, 71.)

What evidence could be clearer that the libelant took it upon himself to determine his duty toward the vessel; and to put his own wishes above the commands of his superior officer?

(B) SUCH CONDUCT JUSTIFIED LIBEL- ANT'S DISCHARGE.

The enormity of a seaman's disobedience is thus put by Mr. Parsons:

"Disobedience or misconduct of a sailor is of necessity punishable with great severity, because discipline must be preserved, as without it the ship would always be in great peril, and no voyage could be successfully conducted."

(Law of Shipping, Vol. I, p. 463.)

MacLachlan, an English writer of authority, says:

"Positive disobedience is an offense of the grossest kind. It challenges the existence of authority. If open and avowed, especially if accompanied with insolent language or acts of violence to the officers, it speedily engenders mutiny, and compromises the safety of the ship and all on board."

(Law of Merchant Shipping, p. 266.)

In the case of the *Richard Matt*, 20 Fed. cases 11766, the libelants, being seamen on the Great Lakes, refused to work on Sunday unless paid double, when there was no provision for double wages for Sunday work in the shipping articles. The master refused

the libelants bedding and heat, discharged them and refused to give them any wages. The court allowed them wages *to the time of discharge* and their return fare; saying:

“The *captain had a right to discharge them for this disobedience*, and, if he had contented himself with doing that at the proper time, and under the proper circumstances, I should have refused all compensation to the men, on the ground of forfeiture of wages for disobedience.” (Italics are ours.)

In the case of *Johnson vs. The Cyane*, Fed. Cas. 7381, the libelant was ordered to work on Sunday when his vessel was lying at Oun, Alaska, where by the Russian calendar, our Saturday was Sunday, and our Sunday was regarded as a regular business day. Libelant refused to work and was discharged.

The court allowed wages *up to the time of the discharge* on the ground that the libelant was honestly mistaken as to his duty to work. The court said, however, “In all cases, obedience is the first duty of the seaman, and it is only when the command is clearly unlawful, or the duty exacted is plainly unreasonable and unnecessary, that a refusal to obey can be for a moment countenanced. In the case of *Ulary vs. The Washington*, Fed. Cas. 14323, Judge Hopkinson says: ‘The libelant contends that he was not bound to work on Sunday. There is no law for this position. The nature of the services requires that the men should do so, and *they must not be allowed to set themselves up*

as judges, and refuse to do their duty on such excuses.'" (Italics are ours.)

Libelant endeavored to palliate his conduct by evidence that his usual hours were from 6 P. M. to 6 A. M. (Apostles, p. 40); that he was not notified that his hours had been changed (Apostles, p. 43). But the shipping articles contained no such provision (Apostles, p. 67); nor was there any such agreement made by the mate when hiring libelant (Libelant's cross-examination, Apostles, p. 50); and it was in evidence that a watchman may be required to do duty outside of such hours, as circumstances demand. (Libelant's cross-examination, Apostles, p. 50; cross-examination of Cezar Curty, libelant's witness, Apostles, pp. 26-27; cross-examination of P. Bering, libelant's witness, Apostles, p. 33.)

Further, the shipping articles contained no provision for a watchman's overtime (Apostles, p. 67). The libelant seemed to justify his conduct in demanding overtime on printed regulations of the Sailors' Union, which he carried with him and to which he referred (Apostles, pp. 18-25, 32); or an agreement between the shipowners and the Sailors' Union of the Pacific. (Respondent's, or Claimant's Exhibit 1.)

Mr. P. B. Gill, business agent for the Sailors' Union of the Pacific, at Seattle, called by the claimant, testified that this agreement (Resp. Exhibit 1) was

the working agreement between this company and the union (Apostles, p. 64); that the agreement contained no stipulation that a watchman's hours should be from 6 P. M. to 6 A. M. (Apostles, p. 65); that outside of the agreement such was the general custom, but could be varied (Apostles, p. 66); and that this agreement (as will be seen upon inspection of the exhibit) contained a clause that "Members shall use their best judgment at all times and if in doubt what shall be charged as overtime, shall do the work required of them and then refer the case to the union for adjustment." Section 13. (Apostles, p. 65.)

These extracts from the evidence show that the conduct of the libelant in refusing to work before six o'clock in the evening, when the ship was in a position of danger, the night growing dark and the rain falling, was not justified by his shipping articles; by any agreement with the mate who hired him; by the agreement between the company and the union; or by any custom. On the contrary he acted directly in opposition to every rule of binding obligation which should govern his conduct on board ship.

In concluding this part of the argument we would call to the court's attention that the appellant does not contend that the acts of libelant justified his discharge and a forfeiture of all his wages. On the contrary his wages earned prior to his discharge were tendered

the libelant at the time and no claim has been made for them in this proceeding.

We beg the court to consider that the responsibility for the safety of the ship, the lives of her passengers and crew, and the security of her cargo rests upon her officers; that their authority over her crew, once infringed upon is broken forever; and that the certainty of a faithful performance of their duties by the seamen and a prompt obedience to the commands of their superior officers is of vital importance to every ship that goes to sea.

II.

WHERE A PARTY TAKES DEPOSITIONS, THE NECESSITY FOR WHICH IS ELIMINATED AT THE TIME THE CAUSE IS CALLED FOR TRIAL AND THE WITNESS IS PRESENTED IN COURT FOR ORAL EXAMINATION, AND THE DEPOSITIONS ARE NOT USED, NO COSTS CAN BE ALLOWED FOR SUCH DEPOSITIONS.

The testimony of the libelant, Arthur J. Gilbert, and of P. Bering, a witness on his behalf, was taken by deposition before trial by stipulation of proctors (Apostles, pp. 8 and 36). The deposition of libelant was not used, as he was produced and examined in open court (Apostles, pp. 37 to 62); but the deposition

of P. Bering was used, the witness having been orally examined on another matter (Apostles, pp. 62 and 82).

The libelant included in his cost bill a proctor's fee for taking the deposition of P. Bering and the cost of the transcript of all the depositions, including his own and that of P. Bering. To these items the claimant excepted and exception was allowed to the item for the transcript; the clerk disallowing costs for transcript of the depositions of Arthur J. Gilbert and P. Bering (Apostles, pp. 88-89). On appeal by libelant to the court, the costs for transcript of all the depositions were allowed on the ground that the depositions were taken in good faith although the necessity for their use had disappeared (Apostles, p. 90).

No objection is here made to the allowance of such costs for the deposition of P. Bering; for that deposition was in fact used on the trial without objection, although the witness was present in court and afterward examined on another point. It is to the allowance of costs for the transcript of libelant's own deposition, he having been produced and examined in open court and his deposition not used, that the fourth assignment of error is directed.

It is the rule in admiralty, as in other courts, that the allowance of costs depends upon statutory authority, or some rule of court made in pursuance of a statute. As stated by Judge McPherson, in the Third

Circuit, "Ultimately, no doubt, the power to impose costs must be found in a statute; but the legislature may grant the power in general terms to the courts, and these tribunals may then establish a fee bill by a rule or order that will have the binding force of a legislative act. This grant has already been made by Congress * * *."

Tesla Electric Co. vs. Scott, 101 Fed. 524.

Again, in this Circuit, Judge Gilbert, in the case of *Pacific Mail S. S. Co. vs. Iverson*, 154 Fed. 450, said at page 452, "While costs in admiralty are within the discretion of the court and may be allowed or denied on equitable considerations, the amounts and items of the costs allowable are not within the court's discretion but are fixed by statute. The court has no power to allow costs other than statutory costs, except in cases where expense has been incurred in the conduct of the case, under the order of the court."

The statutes of the United States make no provision for the allowance of costs in such a case as this. The only rule of the court below in any way applicable to such a case is Rule 70, section 7, subds. (d) and (f), which are as follows:

"(d) The fees of the reporter for taking down testimony and proceedings in court, or before a master or examiner, and for taking down arguments or other matter by order of the court or by stipulation of the parties, and *for transcribing testimony or proceedings*

before the court or before a master or examiner, and for transcribing arguments or any other matter by order of the court or by stipulation of the parties, shall be taxed as costs." (Italics are ours.)

"(f) Every deposition, whether taken before an examiner or upon commission, and *read or offered in evidence*, shall be deemed to have been admitted in evidence, unless the court has expressly excluded the same." (Italics are ours.)

It is clear that whatever effect the general language of subdivision "d" of Section 7, Rule 70, may have upon the right to tax as costs disbursements for depositions, it is qualified by the implication of subdivision "f," that the depositions must have been used.

This view is in accordance with the practice of allowing a proctor's fee for taking depositions under U. S. R. S. Sec. 824; which is not allowed if the deposition is not used. (*Barnardin vs. Northall*, 83 Fed. 241; *Cahn vs. Lung*, 28 Fed. 396.)

Bearing in mind that these depositions were taken *de bene esse*, and not upon a reference of the cause to a commissioner, it is obvious that the right to take the depositions was a privilege extended to the libellant as a convenience depending upon the necessity of the libellant at the time of trial, which did not arise. This is shown by the testimony of the libellant, the taking of whose deposition is under consideration, when appearing in court as a witness at the final hearing, that he would not accept employment on other vessels; *because such employment would prevent his being*

present when this cause came on to be heard before the court. (Apostles, pp. 45-46 and 59) (Italics are ours.)

The court below failed to give this distinction any attention and apparently overlooked the effect of libelant's testimony, above referred to. In allowing libelant his disbursements in taking these depositions, which were not used, the original necessity for which was directly negatived by libelant's own testimony, the court acted without authority of statute or rule of court and contrary to the established practice of admiralty courts.

The case of *The Persiana*, 158 Fed. 912, is directly in point. There the libel was dismissed on claimant's motion, he not having offered in evidence depositions taken by him for use at the trial. The court said:

"The libel is dismissed; but as the claimant did not offer his depositions in evidence he can tax neither his costs nor *disbursements* in respect of said depositions." (Italics are ours.)

This case should be a conclusive authority upon this point and is clearly consonant with the law.

Respectfully submitted,

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT,

LAWRENCE BOGLE,

Proctors for Appellant.

No. 2829

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COM-
PANY, Owner and Claimant of
the Steamship "Seward,"

Appellant,

vs.

ARTHUR J. GILBERT,

Appellee.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

BRIEF OF APPELLEE

EIMON L. WIENIR,

Proctor for Appellee.

Suite 303 Maynard Building,
Seattle, Washington.

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Northern Division

BRIEF OF APPELLEE

STATEMENT.

The libelant shipped as night watchman on board the S. S. "Seward" for a voyage from Seattle to Anchorage, Alaska, and return to Seattle, on September 25, 1915, at a monthly wage of fifty dollars (\$50.00), and fifty cents (50c) per hour for overtime.

There were no hours of employment specified in the shipping articles, but libelant's usual hours were from six p. m. to six a. m. On a previous trip on the same vessel his hours were from six p. m. to six a. m.; he understood the same hours applied upon the trip in issue, and he was on duty from six p. m. to six a. m., from the time the vessel left Seattle until October 4th, when he was forcibly discharged from the vessel.

On October 3rd, at 5:45 p. m., while preparing to "turn to" his watch, the first mate appeared before libelant and asked him, "Why aren't you on watch?" Libelant replied, "It isn't six o'clock yet," to which the mate replied that it didn't make any difference, he was supposed to be on watch at five o'clock. Libelant then said, "It don't make any difference to me, only I have got an hour more overtime for it." The mate ridiculed the idea of libelant thinking he would be paid overtime, and libelant made the retort that he was too familiar with the rights and duties of a watchman not to know when he had overtime coming to him. The mate then said, "I am mate aboard this ship and I'm going to be mate aboard this ship."

The discussion thus ended. The libelant "turned to" his work as usual that night at six p. m., or a little sooner, and "turned in" at six a. m. the next day, as was his custom. That afternoon, while the ship was

lying at Juneau, the mate tendered libelant the money due him as wages for the voyage to that port. The libelant refused to accept that amount. Subsequently in the evening of that day, the libelant "turned to" his work as usual and after working about an hour or so, the mate came up to him and forcibly ejected him from the ship. Libelant remained at Juneau for the period of ten days before securing his passage to Seattle. His fare from Juneau to Seattle was sixteen dollars (\$16.00). This action was brought to recover the wages for the trip, expenses necessarily incurred and five hundred dollars (\$500.00) damages.

The court, after reading depositions and hearing witnesses in open court, rendered the following decision:

"Libelant was employed as night watchman on board the Steamship Seward, September 25, 1915. No hours of employment were specified in the shipping articles. On a previous trip on the same vessel his hours were from six p. m. to six a. m. He understood the same hours applied upon the trip in issue, and he was on duty from six p. m. to six a. m., from the time the vessel left the port of Seattle until the controversy arose some days later. On October 3rd, while preparing to 'turn to' his watch at 5:45 p. m., the first mate asked him, 'Why aren't you on watch?' Libelant replied, 'It isn't six o'clock yet,' to which the mate replied that it didn't make any difference, he was supposed to be on watch at five o'clock, to which libelant replied, in substance, that it would mean an hour overtime for him. There was some further

conversation between libelant and the mate, in which the mate asked libelant whether he would not work unless given overtime, and libelant said he would not, or words to that effect; but proceeded to enter upon the discharge of his duties. He was discharged and taken from the vessel on its arrival at Juneau, Alaska, the following day. The mate tendered to libelant the amount of wages earned to the time of discharge, which the libelant refused. Libelant remained at Juneau, Alaska, for the period of ten days before securing return passage to Seattle. His fare from Juneau to Seattle was \$16.00. He has brought this action to recover the wages for the trip, expenses necessarily incurred to return to Seattle, and \$500.00 damages.

“No hours of employment were mentioned in the shipping articles. The agreement between the Puget Sound Shipping Association, of which claimant is a member, and the Sailors Union, of the Pacific, of which libelant is a member, provides that the hours of regular seamen shall be from seven o'clock a. m. to five o'clock p. m., with one hour off for lunch, and further provides that the work outside of these hours, ‘except such work as is necessary for the immediate safety of the vessel or passengers, cargo and crew,’ shall be paid for as overtime. The agreement further provides that quarter-masters, stationmen, and watchmen, when working, shall perform their regular duties without charge for overtime, and provides the hours of such employment to be from seven a. m. to five p. m. These hours manifestly do not apply to night watchmen. Section 13 of this agreement provides, ‘Members of the Sailors Union shall use their best judgment at all times, and if in doubt as to what shall be charged as overtime, shall do the work required of them, and then refer the case to the Union for adjustment.’ The conduct

of libelant in this case does not indicate that the language employed expressed his real intention, except as a claim under Section 13, *supra*, as he immediately 'turned to' his work and remained aboard the ship until his discharge, at all times manifesting his willingness to do his duty. The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors Union of the Pacific, and the hours of six to six having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service; nor mutinous or rebellious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him. I think the libelant should recover his wages for the trip, the \$16.00 fare expended, and \$35.00 to reimburse him for the outlay which was occasioned at Juneau, Alaska.

"A decree may be prepared."

Outside of the question of the taxing of costs, which I shall discuss later, the sole question at issue in this case is: Was libelant's conduct such as justified the mate in discharging him?

ARGUMENT.

By appellant's own witnesses it was shown that libelant was a competent watchman; that libelant had had no difficulties with his superiors at any time previous to the 3rd day of October; *that it was at least 5:15 p. m. when the mate asked libelant why he wasn't on watch at 5:00 p. m.* (Apostles p. 75); that the mate never told libelant that his hours of employment had been changed; that, in fact, the mate never before had told libelant to be on watch at 5:00 p. m. (Apostles p. 76). How, then, could libelant have disobeyed the order of his superior officer? It is to be noted that libelant "turned to" his work, almost immediately after the controversy with the mate—within five minutes from that time—and discharged his duties as usual until the next morning (Apostles p. 42). I don't see where there is a scintilla of evidence to base the argument that the conduct of libelant amounted to insubordination and disobedience.

The general rule as to the sufficiency of the grounds for discharging seamen is thus stated in 35 Cyc. 1189:

"B. DISCHARGE—1. By Master or Owner—
a. Grounds.

"Claims for wages are highly favored in admiralty courts, and discharges are not justified for

trivial causes, nor for a single offense, unless of a highly aggravated character. Generally speaking, the causes which justify a discharge before termination of the voyage are such as amount to a disqualification and show the seaman to be unfit for the service, or to be trusted in the vessel. Such causes are continued disobedience or insubordination; mutinous and rebellious conduct persevered in; gross dishonesty, or embezzlement, or theft; habitual drunkenness; or where the seaman is habitually a stirrer-up of quarrels, or by his own fault renders himself incapable of performing his duty. As a general rule the maritime law requires the master to receive back a seaman when he has thus discharged him, if he repents and seasonably offers to return to his duty and make satisfaction, unless the offense for which he was discharged was of an aggravated or disqualifying character."

In the *Mentor*, 17 Fed. Cases, No. 9427, Circuit Justice Story thus states his conclusions:

"I should be sorry indeed to lay it down as a general proposition, that any act of disobedience by a seaman, however slight, is of course to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of a voyage. Such a principle, it seems to me, would be very disastrous to the commercial interests of the country, and would involve so many difficulties in its application, that the denial of wages would soon, from the necessities of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment. My opinion is, that the disobedience must either be an act of a very gross nature, involving serious danger, a mischief, or malignancy; or it must be habitual, and produce such a gen-

eral diminution of duty, as goes to the very essence of the contract.”

In the same opinion the court says:

“Those judges, in our own courts, who have been called most frequently to administer this branch of law, have certainly not felt themselves bound to inflict the forfeiture of wages for slight misbehavior, whether by disobedience or negligence; and even aggravated offences and very gross acts have been dealt with in a cautious and indulgent spirit. It appears to me that there is much in the reasoning of these enlightened persons, that cannot fail to commend itself to every maritime court.”

In *Hutchinson vs. Coombs*, 12 Fed. Cases, No. 6955, Judge Ware states the rule to be:

“That a master has, by the marine law, a right in certain cases to turn a mariner out of the vessel, is admitted. But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character.”

In *Jones vs. Sears*, 13 Fed. Cases, No. 7494, it is said:

“The general rule is that a master in a foreign port may discharge seamen if he cannot retain them on board with safety, but not otherwise.”

In *Thorne vs. White*, 23 Fed. Cases, No. 13989, the court held:

“When a mariner is incorrigibly disobedient, and will not submit to do duty and make amends, the master may discharge him.”

In the *T. F. Oakes*, 36 Fed. 442, in stating the causes for which a seaman may be discharged, it was held:

“In my judgment a premeditated and persistent shirking and slighting of duty, as well as a deliberate and continued attitude of insolence and defiance to his superiors, on the part of a seaman, is such a cause; particularly where it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty.”

No further citation of authorities, I believe, is necessary on this point, the authorities being all agreed as to the essential elements of the rule, though the courts differ in the language used to formulate it.

II.

As to allowance of costs for taking deposition.

The libelant took the testimony of one of his witnesses, who is a seaman about to sail, in good faith, upon the belief that he would not be present when the cause was tried. The ship in which this witness sailed arrived in the city just prior to the time that the case was tried, and the witness was called instead of his deposition read. The sole question on this phase of the appeal is: Should costs for taking the deposition be allowed?

The District Court rendered the following decision:

“It appears that the libelant took the testimony of one of his witnesses who is a seaman about to sail, in good faith, upon the belief that he would not be present when the cause was tried. The ship in which this witness sailed arrived in the city during the time the cause was being tried, or just prior to it being tried, and the witness was called instead of his deposition read. The libelant has taxed the costs of the deposition, and the claimant has moved to retax and disallow the costs.

“The claimant has cited *The Persian*, 158 Fed. 912; *Barnardin vs. Northall*, 83 Fed. 241; *Cahn vs. Monroe*, 29 Fed. 675; *Cahn vs. Gung Wah Lung*, 28 Fed. 396; *Lamb vs. Stone*, 28 Mass. 526. These cases, I do not think, throw any light upon this issue. In *The Persian*, Judge Hough simply held that an attorney’s fee for taking a deposition was not chargeable where the deposition was not offered in evidence, and the same holding was made by Judge Baker in *Barnardin vs. Northall*, and in *Cahn vs. Monroe*, it was held that a witness called, and testifying, but not subpoenaed, was entitled to his per diem.

“I think it would be manifestly unjust not to permit costs, where a party takes a deposition in good faith, though the necessity for the taking is eliminated at the time the cause is called for trial and the witness is presented in court for oral examination, direct and cross, rather than reading the deposition, and this view is sustained by *Nead vs. Millersburg Home Water Co.*, 79 Fed. 129, and also by the Supreme Court of California, in *Lomita Land & Water Co. vs. Robinson*, 97 Pac. 10, 18 L. R. A. (N. S.) 1106.

“I think the costs for deposition should be allowed.”

I respectfully urge this court to affirm the District Court’s ruling on the questions involved in this appeal.

Respectfully submitted,

EIMON L. WIENIR,

Proctor for Appellee.

No. 2837

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff in Error,

vs.

JOHN P. CARTER, Collector of the United States
Internal Revenue for the Sixth District of the
State of California,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

AUG 12 1916

F. D. Monckton,
Clerk.

No. 2837

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff in Error,

VS.

JOHN P. CARTER, Collector of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

SHELDON BORDEN and GEORGE H.
MOORE, Esqs., 426-31 Stimson Block,
Los Angeles, California.

For Defendant in Error:

ALBERT SCHOONOVER, Esq., United
States Attorney, and M. G. GALLAHER,
Esq., Assistant United States Attorney,
Los Angeles, California. [3*]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 387-CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Judges of the District Court of the United
States, in and for the Southern District of Cali-
fornia, Southern Division, Greeting:

*Page-number appearing at foot of page of original certified Record.

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between Union Hollywood Water Company, a corporation, plaintiff in error, and John P. Carter, Collector of United States Internal Revenue for the Sixth District of the State of California, defendant in error, a manifest error hath appeared to the plaintiff in error, Union Hollywood Water Company, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 19th day of August, 1916, in the Circuit Court of Appeals, to be then and there [4] held, that the records and proceedings aforesaid be inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 20th day of July, in the year of our Lord one thousand and nine hundred and sixteen, and of the In-

dependence of the United States the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,
Clerk of the District Court of the United States, in
and for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed.

TRIPPET,

I hereby certify that a copy of the within Writ of Error was on the 20th day of July, 1916, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk. [5]

[Endorsed]: Original. No. 387-Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of United States Internal Revenue, Defendant. Writ of Error. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 387-CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Citation.

To John P. Carter, Collector of the United States
Internal Revenue for the Sixth District of the
State of California, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be held at the City of San
Francisco, in the State of California, on the 19th day
of August, 1916, pursuant to a writ of error on file in
the clerk's office of the District Court of the United
States, in and for the Southern District of Cali-
fornia, in that certain action No. B.-387-Civil,
wherein Union Hollywood Water Company, a cor-
poration, is plaintiff in error and you are defendant
in error, to show cause, if any there be, why the
judgment given, made and rendered against the
said plaintiff Union Hollywood Water Company, in
said writ of error mentioned, should not be cor-

rected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET, United States District Judge of the Southern District of California, this 20th day of July, 1916, and of the independence of the United States, the one hundred and forty-first.

TRIPPET,
United States District Judge for the Southern District of California. [7]

A copy of the within citation received this 20th day of July, 1916.

M. G. GALLAHER,
Asst. U. S. Attorney,
Atty. for Defendant.

[Endorsed]: Original. No. 387-Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of United States Internal Revenue, Defendant. Citation. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. [8]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 387-CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States Internal Revenue for the Sixth District of the State of California,

Defendant. [9]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States Internal Revenue for the Sixth District of the State of California,

Defendant.

**Complaint for Collection of Taxes Paid Under
Protest.**

The plaintiff above named complains of the defendant above named and files this, its complaint to recover from said defendant taxes illegally assessed

to it and collected from it as hereinafter more specifically alleged, and avers as follows:

FIRST COUNT.

I.

That plaintiff is now and at all times in this complaint stated has been a public utility corporation organized and existing under and by virtue of the laws of the State of California, and was at all such times and now is engaged in the operation of a water system for the furnishing and distributing of water for domestic use and irrigation to its consumers and customers both within and without the corporate limits of the City of Los Angeles, County of Los Angeles, State of California, and having its principal place of business at the said City of Los Angeles; that during all said times plaintiff has devoted and now devotes to the public use, as a public utility company, its property and plant, consisting of wells, pumps, mains, laterals, reservoirs, pipes, machinery and kindred articles, also its leased lands, leased water plants, real estate and other accessories necessary and essential to the operation of its said system; that [10] plaintiff's said office and principal place of business is in the Southern District of California, and likewise within the Sixth Internal Revenue District of the State of California.

II.

That defendant is, and for more than six months prior to the commencement of this action has been the collector of United States Internal Revenue for the Sixth District of the State of California, and

was at the time of the assessment and collection from the plaintiff of the hereinafter alleged illegal assessment of Internal Revenue Taxes, the collector of said United States Revenue for the Sixth District of California.

III.

That the defendant is indebted to the plaintiff in the sum of \$718.83 for money had and received for the use of plaintiff on December 3d, 1914, by the said defendant, as collector of United States Internal Revenue, for the Sixth District of California.

IV.

That the said sum of \$718.83 was illegally and erroneously assessed to the plaintiff by the commissioner of Internal Revenue for the United States on or about September 30, 1914, as an additional tax upon the annual net income of the plaintiff for the year ending December 31st, 1912, contrary to the provisions of that certain act of the Sixty-first Congress, First Session, entitled "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States, and for Other Purposes," approved August 5th, 1909; that in making such additional assessment, said commissioner of Internal Revenue charged unto the plaintiff as a part of its income, certain receipts during the year 1912, which plaintiff received and expended as hereinafter alleged.

That during the year 1912, plaintiff received from consumers to pay for service connections to be laid in public streets [11] both within and without the said City of Los Angeles, the sum of \$33,024.50 and,

of the moneys so received, expended during said year 1912, in laying service connections in such public streets, the sum of \$31,006.12; that during the year 1912, plaintiff received from property owners and persons engaged in the subdivision and sale of real estate, to pay for extensions of the plaintiff's system into their property, within and without the said City of Los Angeles, the sum of \$52,895.65 and, of the moneys so received, expended during said year 1912 in laying extensions of its said system in and through such property, the sum of \$21,235.12; that the term "bonus pipes" is commonly applied to and used to describe pipes laid by plaintiff and paid for by such contributions; that in its annual return for the year 1912, plaintiff included in its gross receipts for the year ending December 31st, 1912, the said sums of \$33,024.50 and \$52,895.65, aggregating the sum of \$85,920.15 received by it in manner aforesaid, and claimed a credit and deduction under the head of "Expense of installation, services and bonus pipe" for the said sums of \$31,006.12 and \$51,235.12, aggregating the sum of \$82,241.24; that in levying said additional taxes for the said year 1912, the said commissioner of Internal Revenue for the United States refused to allow the credit and deduction aforesaid, and illegally and erroneously assessed against the plaintiff the sum of \$276.08 on the amount contributed to and received by plaintiff to pay for service connections in public streets as aforesaid, and the sum of \$442.75 on the amount contributed to and received by plaintiff to pay for extensions of its said system into the contributor's property as aforesaid,

and hereinbefore referred to as "bonus pipes."

V.

That the moneys contributed to and received by plaintiff to pay for service connections laid in public streets as [12] aforesaid and expended for that purpose in 1912 as hereinbefore alleged, were paid over to plaintiff and received by it for the specific purpose of purchasing and installing service connections in public streets in front of the property owned or occupied by the persons contributing such moneys and of supplying water unto such persons by and through such service connections and not otherwise; that the moneys contributed to and received by plaintiff from property owners and persons engaged in the subdivision and sale of real estate to pay for extensions of plaintiff's system into their property as aforesaid, and expended for that purpose in 1912 as hereinbefore alleged, were paid over to plaintiff and received by it for the specific purpose of purchasing water pipes and laying the same in public streets for the benefit of the public and of the persons contributing said moneys; that said contributions were paid to and received by plaintiff under and by virtue of written contracts between plaintiff and the said contributors, wherein and whereby plaintiff agreed, in consideration of the money so contributed, to purchase and lay said additional water pipes and to connect the same with its system and thereafter to perpetually keep up and maintain the said extensions and to supply water unto consumers who could be supplied from the extensions so made, at the same rates and under the same terms

and conditions as to other consumers supplied from plaintiff's said system; that the plaintiff's said system was enlarged to the extent of such additional service connections and extensions, but plaintiff's gains or profits were not increased by the said enlargement of its system, except in so far as the same enabled the plaintiff to collect and receive water rates from such additional consumers as might thereafter be supplied by and through the said additions to its system.

VI.

That on November 5th, 1914, plaintiff presented to and filed with the defendant, as such collector of United States [13]. Internal Revenue, its application and claim for the remission and abatement of the said assessment, a copy of which application and claim is hereunto annexed and marked exhibit "A" and made a part of this complaint; plaintiff is informed and believes and on such information and belief alleges that the said last mentioned application and claim was submitted to the said commissioner of Internal Revenue and that on or about November 30th, 1914, the said commissioner of Internal Revenue by virtue of his office, overruled the said application and claim and refused to abate the aforesaid tax or any part thereof, and directed the defendant to collect from plaintiff the said tax; that on November 30th, 1914, the defendant notified plaintiff of such ruling by the said commissioner of Internal Revenue and demanded of plaintiff the said sum of \$718.83, and notified plaintiff that the same must be paid prior to December 6th, 1914, or

plaintiff would be liable for the payment of the penalty thereon; that in response to said demand, but under protest that the said assessment and tax were illegal and unwarranted by law, and to the end that this suit might be filed to recover back the said sum, plaintiff paid the defendant on December 3d, 1914, the sum of \$718.83; that at the time of such payment plaintiff served upon the defendant a notice that the said payment was made under protest, a copy of which notice is hereunto attached and marked exhibit "B" and made a part of this complaint.

VII.

That no part of the said sum of \$718.83 has been repaid to the plaintiff and the same and the whole thereof, together with interest thereon at the rate of seven per cent per annum from December 3d, 1914, is due, owing and unpaid from defendant to plaintiff. That six months have not elapsed since the payment by plaintiff unto defendant of the said sum of \$718.83 as hereinbefore alleged. That prior to the commencement of this action plaintiff demanded of defendant a refund of said amount, which demand was refused. [14]

VIII.

Plaintiff is informed and believes and on such information and belief alleges, that any appeal from the aforesaid assessment herein complained of, to the said commissioner of Internal Revenue would have been an idle and useless act; that having overruled the plaintiff's said application and claim for remission and abatement of the aforesaid tax, and directed the collection thereof from plaintiff as

aforesaid, the said commissioner of Internal Revenue would have affirmed his former ruling and dismissed such an appeal if same had been taken by plaintiff.

SECOND COUNT.

I.

Plaintiff refers to Paragraph I of the first count of this complaint, and by reference thereto makes the said paragraph a part of this, the second count of this complaint, in all respects the same as if the allegations therein contained had been expressly repeated and reiterated herein.

II.

Plaintiff refers to Paragraph II of the first count of this complaint, and by reference thereto makes the said paragraph a part of this, the second count of this complaint, in all respects the same as if the allegations therein contained had been expressly repeated and reiterated herein.

III.

That the defendant is indebted to the plaintiff in the sum of \$591.51 for money had and received for the use of plaintiff on December 3d, 1914, by the said defendant as collector of United States Internal Revenue for the Sixth District of California.

IV.

That the said sum of \$591.51 was illegally and erroneously assessed to the plaintiff by the commissioner of Internal [15] Revenue of the United States on or about September 30, 1914, as an additional tax upon the annual net income of the plaintiff for the year ending December 31st, 1913, contrary to the provisions of that certain act of the

Sixty-first Congress, First Session, entitled "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States, and for Other Purposes," approved August 5th, 1909; that in making said additional assessment, said commissioner of Internal Revenue charged unto the plaintiff as a part of its income, certain receipts during the year 1913, which plaintiff received and expended as hereinafter alleged.

That during the year 1913 plaintiff received from consumers to pay for service connections to be laid in public streets both within and without the said City of Los Angeles, the sum of \$24,814.99 and out of the said moneys so received and moneys received for like purposes in previous years, expended during said year 1913, in laying service connections in such public streets, the sum of \$28,558.26; that during the year 1913, plaintiff received from property owners and persons engaged in the subdivision and sale of real estate, to pay for extensions of the plaintiff's system into their property, within and without the said City of Los Angeles, the sum of \$32,785.69, and of the moneys so received, expended during said year 1913 in laying extensions of its said system in and through such property the sum of \$29,927.03; that the term "bonus pipes" is commonly applied to and used to describe pipes laid by plaintiff and paid for by such contributions; that in its annual return for the year 1913, plaintiff included in its gross receipts for the year ending December 31st, 1913, the said sums of \$24,814.99 and \$37,785.69, aggregating the sum of \$57,600.68 received by it in manner aforesaid,

and claimed a credit and deduction under the head of "Expense of installation, services and bonus pipe extensions" for the said sums of \$28,558.26 and \$29,927.03, aggregating the sum of \$58,485.29; that in levying said additional taxes for the said [16] year 1913, the said commissioner of Internal Revenue for the United States refused to allow the credit and deduction aforesaid, and illegally and erroneously assessed against the plaintiff the sum of 254.83 on the amount contributed to and received by plaintiff to pay for service connections in public streets as aforesaid, and the sum of \$336.68 on the amount contributed to and received by plaintiff to pay for extensions of its said system into the contributor's property as aforesaid, and hereinbefore referred to as "bonus pipes."

V.

That the moneys contributed to and received by plaintiff to pay for service connections laid in public streets, as aforesaid and expended for that purpose in 1913 as hereinbefore alleged, were paid over to plaintiff and received by it for the specific purpose of purchasing and installing service connections in public streets in front of the property owned or occupied by the persons contributing such moneys and of supplying water unto such persons by and through such service connections and not otherwise; that the moneys contributed to and received by plaintiff from property owners and persons engaged in the subdivision and sale of real estate to pay for extensions of plaintiff's system into their property, as aforesaid, and expended for that purpose in 1913 as

hereinbefore alleged, were paid over to plaintiff and received by it for the specific purpose of purchasing water pipes and laying the same in public streets for the benefit of the public and of the persons contributing said moneys; that said contributions were paid to and received by plaintiff under and by virtue of written contracts between plaintiff and the said contributors, wherein and whereby plaintiff agreed, in consideration of the money so contributed, to purchase and lay said additional water pipes and to connect the same with its system and thereafter to perpetually keep up and maintain the said extensions and to supply water unto consumers who could be [17] supplied from the extensions so made, at the same rates and under the same terms and conditions as to other consumers supplied from plaintiff's said system; that the plaintiff's said system was enlarged to the extent of such additional service connections and extensions, but plaintiff's gains or profits were not increased by the said enlargement of its system, except in so far as the same enabled the plaintiff to collect and receive water rates from such additional consumers as might thereafter be supplied by and through the said additions to its system.

VI.

That on November 5th, 1914, plaintiff presented to and filed with the defendant as such collector of United States Internal Revenue, its application and claim for the remission and abatement of the said assessment, a copy of which application and claim is hereunto annexed and marked exhibit "C" and

made a part of this complaint; plaintiff is informed and believes and on such information and belief alleges that the said last mentioned application and claim was submitted to the commissioner of Internal Revenue and that on or about November 30th, 1914, the said commissioner of Internal Revenue, by virtue of his office overruled the said application and claim and refused to abate the aforesaid tax or any part thereof, and directed the defendant to collect from plaintiff the said tax; that on November 30th, 1914, the defendant notified plaintiff of such ruling by the said commissioner of Internal Revenue and demanded of plaintiff the said sum of \$591.51 and notified plaintiff that the same must be paid prior to December 6th, 1914, or plaintiff would be liable for the payment of the penalty thereon; that in response to said demand, but under protest that the said assessment and tax were illegal and unwarranted by law, and to the end that this suit might be filed to recover back the said sum, plaintiff paid the defendant on December 3d, 1914, the sum of \$591.51; that at the time of such payment plaintiff served upon the defendant a notice [18] that the said payment was made under protest, a copy of which notice is hereunto attached and marked exhibit "D" and made a part of this complaint.

VII.

That no part of the said sum of \$591.51 has been repaid to the plaintiff and the same and the whole thereof, together with interest thereon at the rate of seven per cent per annum from December 3d, 1914, is due, owing and unpaid from defendant to plaintiff.

That six months have not elapsed since the payment by plaintiff unto defendant of the said sum of \$591.51 as hereinbefore alleged. That prior to the commencement of this action plaintiff demanded of defendant a refund of said amount, which demand was refused.

VIII.

Plaintiff is informed and believes and on such information and belief alleges, that any appeal from the aforesaid assessment herein complained of, to the said commissioner of Internal Revenue would have been an idle and useless act; that having overruled the plaintiff's said application and claim for remission and abatement of the aforesaid tax, and directed the collection thereof from plaintiff as aforesaid, the said commissioner of Internal Revenue would have affirmed his former ruling and dismissed such an appeal if same had been taken by plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of seven hundred eighteen and 83/100 (\$718.83) Dollars, with interest thereon at the rate of seven (7%) per cent per annum from December 3d, 1914, and for the further sum of Five hundred ninety-one and 51/100 (\$591.51) Dollars, with like interest thereon from December 3d, 1914, and for its costs of suit.

SHELDON BORDEN,
GEORGE H. MOORE,
Attorneys for Plaintiff. [19]

State of California,
County of Los Angeles,—ss.

C. J. Heyler, being first duly sworn, deposes and says: That he is the president of the Union Hollywood Water Company, a corporation, the plaintiff in the action named in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief and that as to those matters and things he believes it to be true.

C. J. HEYLER.

Subscribed and sworn to before me this 1st day of June, 1915.

[Seal] LORETTA E. ERBACHER,
Notary Public in and for the County of Los Angeles,
State of California. [20]

Exhibit "A" to Complaint.

UNITED STATES INTERNAL REVENUE.

**CLAIM UNDER SERIES 7, No. 14, FOR REMIS-
SION OF TAXES ABATABLE UNDER
SEC. 3220 OR SEC. 3221, R. S., OR SEC. 6,
ACT OF MARCH 1, 1879, AS AMENDED.**

State of California,
County of Los Angeles,—ss.

C. J. Heyler of the City of Los Angeles and State and County aforesaid, being duly sworn according to law, deposes and says: That he is President of the Union Hollywood Water Company, a corporation, having its office at No. 212 Laughlin Bldg., in the

City, County and State aforesaid, engaged in the business of a public water company; that in the month of September, A. D. 1914, said corporation was assessed an internal-revenue tax of Seven hundred and eighteen $83/100$ (\$718.83) Dollars upon the annual net income corporation tax for the year ending December 31, 1912, which assessment of the aforesaid tax should, as this deponent verily believes, be abated in part or in whole for the following reasons, viz.:

The assessment is arrived at by charging as income certain receipts by the corporation during the year 1912, viz.:

- | | | |
|-----|---|-----------------|
| (1) | Amount collected from consumers
to pay for service connections
laid in public streets during 1912. | \$33,024.50 |
| (2) | Amount received in 1912 from prop-
erty owners and persons engaged
in subdivision and sale of real es-
tate, to pay for extensions of the
Company's system into their
property, generally called "pipe
bonuses" | 52,895.65 |
| | | <hr/> 85,920.15 |

Of these receipts, the Company
expended during that year:

In laying service-connections in public streets.....	\$31,006.12
---	-------------

In laying extensions of its
system into new territory for
which it paid with such so-called
“pipe bonuses” 51,235.12

\$82,241.24

For which amount the Company claimed credit in its annual statement under the head of “Expense of installation, Services and bonus pipes,” and it now respectfully insists that [21] contributions of this character are not gains, profits, or income within the meaning of the income tax law.

And this deponent now claims that, for the reasons above stated, the said Water Company is justly entitled to have Seven hundred and eighteen 83/100 Dollars of the aforesaid assessment remitted and he now asks and demands the same on behalf of said Union Hollywood Water Company.

C. J. HEYLER.

Sworn to and subscribed before me this 5 day of November, A. D. 1914.

C. C. WHITE,
Deputy Collector. [22]

Exhibit "B" to Complaint.

UNION HOLLYWOOD WATER COMPANY,
212 Laughlin Building.

Los Angeles, Cal., Dec. 3, 1914.

Mr. John P. Carter,

Collector of Internal Revenue for the 6th Dis-
trict of California,

Federal Building,

Los Angeles, Calif.

Dear Sir:

The undersigned, Union Hollywood Water Company (Hereinafter called "The Water Company"), acknowledges receipt of your letter of the 30th ult., advising that its claim for abatement of \$718.83, representing additional special excise and corporation income tax for the year ending December 31, 1912, has been disallowed by the Treasury Department at Washington and that you have been directed to proceed with the collection of said assessment without delay.

In your telephone conversation yesterday with the Water Company's attorney, you advised him that this ruling and decision had been made by Mr. W. H. Osborn, the commissioner of internal revenue and that he thereby overruled the Water Company's application and refused to abate the tax in question.

Of the said sum of \$718.83, \$276.08 represents the income tax assessed against the Water Company on amounts collected by it from consumers to pay for service connections laid in public streets during the year 1912.

The remainder of said sum of \$718.83, amounting to the sum of \$442.75, represents the income tax assessed against the Water Company on amounts collected by it in 1912 from property owners and persons engaged in subdivision and sale of real estate, to pay for extensions of the Water Company's system into their property, generally called "Pipe Bonuses."

In accordance with the demand contained in your letter above mentioned, the Water Company hands you herewith certified checks payable to your order, aggregating the sum of \$718.83, one of the said checks being for the sum of \$276.08 and the other for the sum of \$442.75; these amounts are hereby paid by the undersigned under protest, the reasons for such protest being set forth in the claim for abatement referred to above, and in the argument accompanying said claim heretofore submitted by its attorney.

The undersigned object to and protest against the payment of said sums or any part thereof and you are hereby notified that the same is paid involuntarily and under compulsion and the undersigned proposes and intends to commence an action against you in the District Court of the United States for the recovery of said sums and the whole thereof, together with interest and costs on the ground that the same are unjustly and unlawfully levied and assessed and that contributions of the character referred to above are not gains, profits or income

within the meaning of the income tax law.

Yours truly,

UNION HOLLYWOOD WATER COM-
PANY.

By C. J. HEYLER,
President. [23]

Exhibit "C" to Complaint.

UNITED STATES INTERNAL REVENUE.

CLAIM UNDER SERIES 7, No. 14, FOR REMIS-
SION OF TAXES ABATABLE UNDER
SEC. 3220, OR SEC. 3221, R. S., OR SEC. 6,
ACT OF MARCH 1, 1879, AS AMENDED.

State of California,
County of Los Angeles,—ss.

C. J. Heyler, of the City of Los Angeles and State and County aforesaid, being duly sworn according to law, deposes and says, that he is President of the Union Hollywood Water Company, a corporation, having its office at No. 212 Laughlin Bldg., in the City, County and State aforesaid, engaged in the business of a public water Company; that in the month of September, A. D. 1914, said Corporation was assessed an internal-revenue tax of Five hundred and ninety-one $51/100$ (\$591.51) dollars, upon the annual net income corporation tax for the year ending December 31, 1913, which assessment of the aforesaid tax, should, as this deponent verily believes, be abated in part or in whole for the following reasons, viz.:

The assessment is arrived at by charging as income certain receipts by the corporation during the year 1913, viz.:

(1) Amount collected from consumers to pay for service connections laid in public streets during 1913.....	\$24,814.99
(2) Amount received in 1913 from property owners and persons engaged in subdivision and sale of real estate, to pay for extensions of the Company's system into their property, generally called "pipe bonuses"....	32,785.69
	<hr/>
	57,600.68

Of these receipts, the Company expended during that year:

In laying service-connections in public streets	28,558.26
In laying extensions of its system into new territory for which it paid with such so-called "pipe bonuses".....	29,927.03
	<hr/>
	\$58,485.29

For which amount the company claimed credit in its annual statement under the head of "Expense of installation, Service and bonus pipes," and it now respectfully insists that [24] contributions of this character are not gains, profits, or income within the meaning of the income tax law.

And this deponent now claims that, for the reasons above stated, the said Water Company is justly entitled to have five hundred and ninety-one 51/100 dollars of the aforesaid assessment remitted, and he now asks and demands the same, on behalf of said Union Hollywood Water Company.

C. J. HEYLER.

Subscribed and sworn to before me this 5 day of November, A. D. 1914.

C. C. WHITE,
Deputy Collector. [25]

Exhibit "D" to Complaint.

UNION HOLLYWOOD WATER COMPANY,
212 Laughlin Building.

Los Angeles, Cal., Dec. 3, 1914.

Mr. John P. Carter,

Collector of Internal Revenue, for the 6th District of California,

Federal Building,

Los Angeles, California.

Dear Sir:

The undersigned, Union Hollywood Water Company (Hereinafter called "The Water Company"), acknowledges receipt of your letter of the 30th ult., advising that its claim for abatement of \$591.51, representing additional special excise and corporation income tax for the year ending December 31, 1913, has been disallowed by the Treasury Department at Washington, and that you have been directed to proceed with the collection of said assessment without delay.

In your telephone conversation yesterday with the Water Company's attorney, you advised him that this ruling and decision had been made by Mr. W. H. Osborn, the commissioner of internal revenue and that he thereby overruled the Water Company's application and refused to abate the tax in question.

Of the said sum of \$591.51, \$254.83 represents the income tax assessed against the Water Company on

amounts collected by it from consumers to pay for service connections laid in public streets during the year 1913.

The remainder of said sum of \$591.51, amounting to the sum of \$336.68, represents the income tax assessed against the Water Company on amounts collected by it in 1913 from property owners and persons engaged in subdivision and sale of real estate, to pay for extensions of the Water Company's system into their property, generally called "Pipe Bonuses."

In accordance with the demand contained in your letter above mentioned, the Water Company hands you herewith certified checks payable to your order, aggregating the sum of \$591.51, one of the said checks being for the sum of \$254.83 and the other for the sum of \$336.68; these amounts are hereby paid by the undersigned under protest, the reasons for such protest being set forth in the claim for abatement referred to above, and in the argument accompanying said claim heretofore submitted by its attorney.

The undersigned objects to and protests against the payment of said sums or any part thereof and you are hereby notified that the same is paid involuntarily and under compulsion and the undersigned proposes and intends to commence an action against you in the District Court of the United States for the recovery of said sums and the whole thereof, together with interest and costs, on the ground that the same are unjustly and unlawfully levied, and assessed and that contributions of the character re-

ferred to above are not gains, profits or income within the meaning of the income tax law.

Yours truly,

UNION HOLLYWOOD WATER COMPANY.

By C. J. HEYLER,

President. [26]

[Indorsed]: Original. No. 387-Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of U. S. Internal Revenue for the 6th District of the State of Calif., Defendant. Complaint for Collection of Taxes Paid Under Protest. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received Copy of Within ——— this ——— Day of ———, 191—. ——— Attorney for ———. George H. Moore & Sheldon Borden, Rooms 426 to 431 Stimson Block, Los Angeles, California, Attorneys for Plaintiff. [27]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States Internal Revenue for the Sixth District of the State of California,

Defendant.

Summons.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Los Angeles, County of Los Angeles, State of California.

The President of the United States of America,
Greeting: To John P. Carter, Collector, etc.

You are hereby required to appear in an action brought against you by the above-named plaintiff—in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles . . . within twenty days after the service on you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages demanded in the Complaint as arising from contract or will apply to the Court for any further relief demanded in the Complaint.

WITNESS, the Honorable OSCAR A. TRIPPET, Judge of the District Court of the United States, in and for the Southern District of California, this 1st day of June, in the year of our Lord one thousand nine hundred and fifteen, and of our

Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk. [28]

Return of Service of Summons.

United States Marshal's Office.

Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 1st day of June, 1915, and personally served the same on the 1st day of June, 1915, by delivering to and leaving with John P. Carter, Collector of United States Internal Revenue for the Sixth District of the State of California, ———, said defendant named therein personally, at the County of Los Angeles, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto.

(Signed) C. T. WALTON,
U. S. Marshal,
By G. C. White,
Deputy.

Los Angeles, June 1, 1915. [29]

[Indorsed]: Marshal's Civil Docket No. 2691. No. 287—Civil. U. S. District Court, Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, vs. John P. Carter, Collector of U. S. Internal Revenue, etc. Summons. George H. Moore and Sheldon Borden, Plaintiff's Attorneys. Filed Jun. 4, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. e C. L. R. B 95. [30]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Demurrer to Complaint.

Comes now the defendant above-named, and demurs to the plaintiff's complaint herein, and for cause of demurrer alleges:

I.

That the first count of plaintiff's complaint herein does not state facts sufficient to constitute a cause of action against defendant.

II.

That the second count of plaintiff's complaint herein does not state facts sufficient to constitute a cause of action against defendant.

III

That the first count and the second count of plaintiff's complaint herein, or either of them, do not state facts sufficient to constitute a cause of action against defendant.

WHEREFORE, defendant prays judgment that

the plaintiff take nothing by reason of his complaint herein.

ALBERT SCHOONOVER,
United States Attorney,
M. G. GALLAHER,
Assistant United States Attorney,
Attorneys for Defendant. [31]

[Indorsed]: No. 387—Civil. In the United States District Court of the United States for the South. Dist. of California, Southern Division. Union Hollywood Water Company, a Corporation, Plaintiff, vs. John P. Carter, Collector of United States Internal Revenue, for the Sixth District of the State of California. Demurrer to Complaint. Filed Jun. 19, 1915. Wm. M. Van Dyke, Clerk, By R. S. Zimmerman, Deputy Clerk. Received Copy of the Within Demurrer to Complaint this 19th day of June, 1915. Sheldon Borden, Geo. H. Moore, Attorney for Plaintiff. (C.) [32]

Order Sustaining Demurrer.

At a stated term, to wit, the January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the seventeenth day of April, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 387—CIVIL, S. D.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector, etc.,

Defendant,

This cause having heretofore been submitted to the Court for its consideration and decision on defendant's demurrer to plaintiff's complaint; the Court, having duly considered the same and being fully advised in the premises, now orally announces its conclusions thereon, and it is ordered that defendant's said demurrer to plaintiff's complaint be, and the same hereby is sustained, and that this cause be dismissed, judgment accordingly to be entered herein. [33]

[Indorsed]: No. 387—Civil. United States District Court, Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Plaintiff, vs. John P. Carter, Collector, etc., Defendant. Copy of Minute Order. Filed Apl. 19, 1916. Wm. M. Van Dyke, Clerk. By. T. F. Green, Deputy. [34]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Judgment.

The above-entitled cause having come on regularly to be heard before the Court on the 10th day of April, 1916, upon the demurrer of the defendant therein to the complaint of plaintiff therein, and to each of the separate causes of action therein stated, the plaintiff being represented in court by Sheldon Borden, and the defendant being represented in court by M. G. Gallaher, Assistant United States Attorney, and the argument of counsel having been heard by the Court, and said cause having been submitted upon said demurrer, and it being stipulated by the said representative counsel for the parties that all of the facts of the cause are set forth in the complaint, and thereafter, on the 17th day of April, 1916, said cause having come on for decision by the Court, and the Court

having considered said cause, and the argument of counsel and the law, did make its order sustaining the demurrer of defendant to the complaint of plaintiff, and to each count of said complaint and each cause of action therein stated without leave to the plaintiff to amend said complaint: [35]

Now, on motion of M. G. Gallaher, Assistant United States Attorney, and on behalf of the defendant, judgment in favor of the defendant is ordered by the Court:

AND IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by reason of its complaint herein, and that the defendant go hence hereof without day, and that the defendant have judgment against the plaintiff for its costs herein taxed in the sum of \$6.10.

Judgment entered April 19, 1916.

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy Clerk. [36]

[Indorsed]: No. 397-Civil. In the District Court of the United States for the South. Dist. of California, Southern Division. Union Hollywood Water Company, a Corporation, Plaintiff, vs. John P. Carter, Collector of United States Internal Revenue for the Sixth District of the State of California, Defendant. Copy of Judgment. Filed Apl. 19, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [37]

**Certificate of Clerk U. S. District Court to
Judgment-roll.**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 387—CIVIL. S. D.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of Internal Revenue,
etc.,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original Judgment entered in the above-entitled action and recorded in Judgment-book No. 2 for the Southern Division, at page 355 thereof; and I do further certify that the papers hereto annexed constitutes the Judgment-roll in said action.

ATTEST my hand and the seal of said District Court, this 19 day of April, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By T. F. Green,
Deputy Clerk. [38]

[Indorsed]: No. 387—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, vs. John P. Carter, Collector Internal Revenue, etc. Judgment-roll. Filed Apl. 19, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Recorded Judg. Reg. 2, page 355. [39]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of the United States
Internal Revenue for the Sixth District of the
State of California,

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff by its attorneys and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States District Court of the Southern Dis-

trict of California, Southern Division, at a term thereof, A. D., January term, 1916, against plaintiff on the 19th day of April, 1916, manifest error hath happened to the great damage of plaintiff.

WHEREFORE, plaintiff prays for the allowance of a writ of error, and for an order fixing the amount of bond for a *supersedeas* in said cause and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 19 day of June, 1916.

SHELDON BORDEN,
GEORGE H. MOORE,
Attorneys for Plaintiff. [40]

[Indorsed]: Original. No. 387-Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of U. S. Internal Revenue, etc., Defendant. Petition for Writ of Error. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of within Petition this — day of June, 1916. ———, Attorney for Plaintiff. Sheldon Borden and George H. Moore, Rooms 426 to 431, Stimson Block, Los Angeles, California, Attorneys for Plaintiff. [41]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of the United States
Internal Revenue for the Sixth District of the
State of California,

Defendant.

Assignment of Errors.

(AT LAW.)

Comes now the above-named plaintiff and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in sustaining the demurrer interposed by the defendant, and defendant in error to the original complaint filed in said cause, and by holding and deciding that the facts stated in said complaint were not sufficient to constitute a cause of action in favor of plaintiff and against the defendant.

II.

That the said United States District Court erred

in sustaining the demurrer interposed by the defendant and defendant in error to the first count and cause of action set forth in said complaint, and by holding and deciding that the facts stated in said first count and cause of action were not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. [42]

III.

That the said United States District Court erred in sustaining the demurrer interposed by defendant and defendant in error to the second count and cause of action set forth in said complaint, and by holding and deciding that the facts stated in said second count and cause of action were not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

IV.

That the said United States District Court erred in rendering judgment against the plaintiff in said cause upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in the pleadings in said cause.

WHEREFORE, the plaintiff and plaintiff in error prays that the judgment of the said District Court of the United States be reversed, and such directions be given that plaintiff may recover as in the complaint prayed for.

SHELDON BORDEN,

GEORGE H. MOORE,

Attorneys for Plaintiff and Plaintiff in Error. [43]

[Endorsed]: Original. No. 387—Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of the U. S. Internal Revenue, etc., Defendant. Assignment of Errors. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within assignment this — day of June, 1916. — Attorney for Defendant. Sheldon Borden & George H. Moore, Rooms 426 to 431 Stimson Block, Los Angeles, California, Attorneys for Plaintiff. [44]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States Internal Revenue for the Sixth District of the State of California,

Defendant.

Order Allowing Writ of Error.

At a stated term of the District Court of the United States, in and for the Southern District of California,

Southern Division, present the Honorable OSCAR A. TRIPPET, District Judge.

On motion of Sheldon Borden, Esq., and George H. Moore, Esq., attorneys for the plaintiff, and upon filing a petition for a writ of error, and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at \$300.

TRIPPET,

United States District Judge. [45]

[Endorsed]: Original. No. 387—Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, vs. John P. Carter, Collector of United States Internal Revenue, Defendant. Order Allowing Writ of Error. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within — this — day of —, 191—. —, Attorney for —. George H. Moore, Sheldon Borden, Rooms 426 to 431 Stimson Building, Los Angeles, California, Attorneys for Complainant. [46]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, C. J. Heyler and O. E. Wern, are jointly
and severally held and firmly bound unto John P.
Carter, Collector of United States Internal Revenue
for the Sixth District of the State of California, de-
fendant above named, and his successor in office, in
the sum of Three hundred (\$300) Dollars, lawful
money of the United States to be paid to him or his
successor; to which payment, well and truly to be
made, we bind ourselves jointly and severally, our
executors and administrators, by these presents.

WHEREAS, lately at the January term of the
above court, in a suit pending in said court between
Union Hollywood Water Company, a corporation,
plaintiff, and John P. Carter, Collector of United
States Internal Revenue aforesaid, defendant, Judg-

ment was rendered against the said plaintiff, and the said plaintiff has obtained or is about to obtain a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said defendant, citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the City and County of San Francisco, thirty days from and after the date of said citation. [47]

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said writ of error to effect and answer all damages and costs if plaintiff fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, we have hereunto subscribed our names and affixed our seals this 19th day of July, 1916.

C. J. HEYLER. (Seal)

O. E. WERN. (Seal)

State of California,
County of Los Angeles,—ss.

C. J. Heyler and O. E. Wern, the sureties whose names are subscribed to the within bond, being severally duly sworn, each for himself, says:

That he is a resident and freeholder in the County of Los Angeles, State of California, and is worth the sum in said bond specified, as the penalty thereof, over and above all his just debts and liabilities, ex-

clusive of property exempt from execution.

C. J. HEYLER.

O. E. WERN.

Subscribed and sworn to before me this 19th day of July, 1916.

[Seal]

LORETTA E. ERBACHER,

Notary Public in and for the County of Los Angeles,
State of California.

Approved July 20, '16.

TRIPPET,

Judge. [48]

[Endorsed]: Original. No. 387—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a corporation, Complainant, vs. John P. Carter, Collector of United States Internal Revenue, Defendant. Cost Bond. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. Received copy of the within ——— this ——— day of ——— 191—. Attorney for ———, George H. Moore, Sheldon Borden, Rooms 426 to 431 Stimson Block, Los Angeles, California, Attorneys for Complainant. [49]

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of United States In-
ternal Revenue for the Sixth District of the
State of California,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of Said Court:

Please prepare a transcript for me upon the writ of error in the Circuit Court of Appeals of the Ninth Judicial Circuit, of the record in the above-entitled case, and include therein the plaintiff's complaint, the summons, the defendant's demurrer, the order sustaining the demurrer without leave to amend and the judgment thereon; the petition for writ of error; assignment of errors; order allowing the writ of error; the writ of error; the citation; the bond, and the certificate of the clerk authenticating the record; such other orders and documents as are necessary to cause a review of the whole record in said cause.

SHELDON BORDEN,

GEORGE H. MOORE,

Attorneys for Plaintiff. [50]

[Endorsed]: Original. No. 387—Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. Union Hollywood Water Company, a Corporation, Complainant, vs. John P. Carter, Collector of United States Internal Revenue, Defendant. Praecipe for Transcript of Record. Filed Jul. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within ——— this ——— day of ———, 191—. ——— Attorney for ———. George H. Moore, Sheldon Borden, Rooms 426 to 431 Stimson Block, Los Angeles, California, Attorneys for Complainant. [51]

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

No. 387—CIVIL.

UNION HOLLYWOOD WATER COMPANY, a
Corporation,

Plaintiff,

vs.

JOHN P. CARTER, Collector of the United States
Internal Revenue for the Sixth District of the
State of California,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court

of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-one (51) typewritten pages, numbered from 1 to 51 inclusive and comprised in one volume, to be a full, true, and correct copy of the Judgment-roll, Petition for Writ of Error, Assignments of Error, Order Allowing Writ of Error, Bond on Writ of Error, and Praecipe for Transcript of Record in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by its attorneys of record.

I further certify that the cost of the foregoing transcript of record on Writ of Error is \$21.30, the amount [52] whereof has been paid me by the Union Hollywood Water Company, the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, on this 26th day of July, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
7/26/16. L. S. C.] [53]

[Endorsed]: No. 2837. United States Circuit Court of Appeals for the Ninth Circuit. Union Hollywood Water Company, a Corporation, Plaintiff in Error, vs. John P. Carter, Collector of the United States Internal Revenue for the Sixth District of the State of California, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed August 4, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2837.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Union Hollywood Water Com-
pany, a corporation,

Plaintiff in Error,

vs.

John P. Carter, Collector of the
United States Internal Revenue
for the Sixth District of the State
of California,

Defendant in Error.

Upon Writ of Error to the United States
District Court of the Southern District of Cali-
fornia.

BRIEF OF PLAINTIFF IN ERROR.

SHELDON BORDEN,

GEORGE H. MOORE,

426-431 Stimson Block,

Los Angeles, California,

Attorneys for Plaintiff in Error.

Filed

SEP 25 1916

F. D. Monckton

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

**Union Hollywood Water Com-
pany, a corporation,**

Plaintiff in Error,

vs.

**John P. Carter, Collector of the
United States Internal Revenue
for the Sixth District of the State
of California,**

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action is brought against the defendant in his capacity as collector of internal revenue, to recover taxes alleged to have been illegally assessed to, and collected from, the plaintiff in error, same having been paid under protest. [Tr. p. 6.]

The defendant in error demurred to the complaint [Tr. p. 31] and his demurrer was sustained; thereupon, the plaintiff declining to amend, an order was entered, sustaining the demurrer and dismissing the cause [Tr. p. 33], and judgment was entered accordingly. [Tr. p. 34.]

To this judgment the writ of error is directed, the sole question being as to whether or not the complaint states facts sufficient to constitute a cause of action.

In the following argument the word "plaintiff" will be used to denote the plaintiff in error, and "defendant" refers to the defendant in error.

The Complaint is in Two Counts.

In the first count plaintiff seeks to recover of defendant, as collector of internal revenue, \$718.83, collected by him of and from the plaintiff for the year ending December 31st, 1912, upon an alleged illegal assessment of income taxes for that year.

The second count is for the recovery of \$591.51, collected by defendant of and from the plaintiff for the year ending December 31st, 1913, upon a similar assessment.

The principle involved in both counts is the same, and it is not necessary that they should be separately argued.

This Action is Maintainable Against Defendant as Internal Revenue Collector.

Apparently opposing counsel do not question this, as no argument on the point was made in the court below.

The demurrer being general however, we submit the following authorities upon the point.

The general provisions of the United States internal revenue laws do not explicitly authorize the maintenance of a suit for the recovery back of such taxes when illegally or improperly exacted, but they do so by clear and necessary implication, * * * and in

accordance with these general provisions, it is held that a United States District Court has jurisdiction of an action to recover money paid to the United States under an erroneous assessment as internal revenue tax and penalty. * * * Besides which, the Federal Judicial Code of 1911 (section 24) provides that district courts of the United States shall have original jurisdiction of all cases arising under any law providing for internal revenue. And under recent legislation of Congress, a suit to recover taxes alleged to have been wrongfully assessed and collected under the internal revenue laws, may be brought directly against the United States instead of against the collector, though the latter is more usually made the defendant.

Black on Income Taxes, sec. 130, and cases cited in note.

Payment Made Under Protest.

The complaint so alleges, and copies of the notices served upon the defendant at the time of making payment, are attached to the complaint. [Exhibits "B" and "D," Tr. pp. 22 and 26.]

It is a general principle of law applicable to income taxes, as well as to any others, that after a taxpayer has exhausted his lawful remedies to induce the administrative officers to cancel or reduce an assessment which he considers illegal or unjust in whole or in part, he must then pay the tax, but may save his right to bring an action for its recovery by accompanying his payment with a protest, addressed to the officer charged with the collection of the tax. This

rule was held applicable to the corporation excise tax law of 1909, and a ruling was made that, no particular form of protest having been prescribed, any form would be sufficient if filed before the payment of the tax, etc.

Black on Income Taxes, secs. 127, 128 and 129;
Abrast Realty Co. v. Maxwell, 206 Fed. 333.

No Appeal to Commissioner Required.

The complaint alleges that application was made to the commissioner of internal revenue for review of the assessment complained of and that he overruled the application and claim, and refused to abate the said tax or any part thereof, and directed the defendant to collect the same from plaintiff. [First count, paragraph VI, Tr. p. 11; second count, paragraph VI, Tr. p. 16.]

Where, after the assessment of an internal revenue tax, alleged to be illegal, application is made to the commissioner of internal revenue for review, and he overrules the application and refuses to abate the tax, it is held that this is a sufficient compliance with the statute, and the plaintiff is not bound after paying the tax, to appeal again to the commissioner as a condition precedent to his right to sue the collector for the recovery of the tax.

Black on Income Taxes, sec. 131;
Weaver v. Ewers, 195 Fed. 247.

It is further alleged in the complaint [paragraph VIII, Tr. p. 18] that any appeal from the assessment complained of to the commissioner of internal revenue would have been an idle and useless act; that having

overruled the plaintiff's application and claim for remission and abatement of the aforesaid tax, and having directed the collection thereof from plaintiff, the said commissioner would have affirmed his former ruling and dismissed such an appeal if the same had been taken.

This allegation is strictly in conformity with the language of the court in *Weaver v. Ewers*, above cited.

Statement of Facts.

Plaintiff is a public utility corporation engaged in the operation of a water system for furnishing and distributing water to the public; it devotes to the public use, as a public utility company, its property and plant, consisting of wells, pumps, mains, laterals, reservoirs, pipes, machinery, leased lands, leased water plant, real estate and other accessories necessary and essential to the operation of its system.

It will appear from the complaint that the assessments complained of are founded upon alleged income received by plaintiff during the years 1912 and 1913.

In the year 1912 plaintiff received from consumers to pay for service connections to be laid in public streets, the sum of \$33,024.50, and expended in laying such service connections the sum of \$31,006.12.

In the same year plaintiff received from property owners and persons engaged in the subdivision and sale of real estate, to pay for extensions of the plaintiff's system into their property, the sum of \$52,895.65, and expended in laying extensions of its system in and through such property, the sum of \$51,235.12.

For the sake of brevity these items will be henceforward referred to as “service connections” and “bonus pipes.”

In the year 1913, plaintiff received from consumers to pay for such service connections the sum of \$24,814.99 and expended in laying such service connections the sum of \$28,558.26.

In the same year plaintiff received in payment for such bonus pipes the sum of \$32,785.69, and expended in laying such bonus pipes the sum of \$29,927.03.

In its income tax returns for 1912 and 1913, plaintiff included these receipts in its gross income and claimed a credit and deduction for the amounts so expended under the heading of “Expense of Installation Services and Bonus Pipe Extensions.” [Tr. pp. 21 and 25.]

The credits so claimed were disallowed by the commissioner of internal revenue, the result being that plaintiff was charged as a part of its income for the years 1912 and 1913, with the gross amount received from the two sources referred to, viz.:

(1) Moneys received from consumers to pay for the installation of service connections.

(2) Moneys received from persons engaged in the subdivision and sale of real estate, to pay for the extension of plaintiff's system into property proposed to be subdivided and sold by them.

As a result of the commissioner's ruling, plaintiff was required to and paid (under protest as already stated) the following sums:

TAXES OF 1912.

On service connections.....	\$276.08
On bonus pipes.....	442.75
Total	<u>\$718.83</u>

TAXES OF 1913.

On service connections.....	\$254.83
On bonus pipes.....	336.68
Total	<u>\$591.51</u>

The assessment based upon service connections is segregated and stated separately from the assessment on bonus pipes so that, in the event that any distinction is sought to be drawn between the receipts from those sources, which the court may consider sound, its judgment may be rendered in accordance with such distinction. In our opinion no such distinction exists.

POINTS AND AUTHORITIES.

I.

It is admitted by the plaintiff that certain moneys were received from the sources mentioned, and for that reason such receipts were included in its statement of gross income; perhaps it was not strictly necessary to include these receipts in gross income, but it was considered the safer and better plan to do so and, in arriving at the plaintiff's net income, to claim a deduction for the expenditures made out of the moneys so received. The deduction so claimed was disallowed by the department and this action resulted.

Our first inquiry should be as to the distinction between the moneys so received and moneys which represent gains, profits, or "net income" within the meaning of the statute in force in 1912 and 1913, viz.: Corporation Excise Tax Law of 1909 (36 Stat. 112, U. S. Comp. Stat. Supp. 1909, p. 844.)

It is contended on behalf of the plaintiff as follows:

(1) That moneys collected from consumers to pay for service connections laid in public streets and expended for that purpose, as well as

(2) Moneys received from property owners and persons engaged in subdivision and sale of real estate, to pay for extensions of its system into their property (called "bonus pipes") and expended in the construction of such extensions:

are not gains, profits, or income within the meaning of said statute.

II.

Such moneys are contributed solely for the purposes designated and for the benefit of the contributors.

They are not subject to distribution among the stockholders of the plaintiff in the way of dividends, or otherwise, nor can the same be used to defray expenses or to pay taxes, interest, etc. These moneys are paid over to the plaintiff for a specific purpose and must be applied to that purpose, viz.:

To purchasing water pipe and service connections and laying the same in public streets for the benefit of the public; the effect is to increase the plant of the plaintiff, but not its gains, profits or income, ex-

cept so far as it enables the plaintiff to collect rates from such additional consumers as may be supplied with water by the service connections and extensions so laid.

It is thoroughly well recognized that a public utility company engaged in serving the public is not the *owner* of its plant and property devoted to the public use, in the sense of *personal ownership*, but is merely intrusted with the use thereof, which it must devote to the public.

Under the provisions of the California Constitution, the use of all water appropriated for sale, rental, or distribution, is a public use.

California Constitution, article XIV, section 1:

“When a man parts with his property it is no longer his. When he devotes it to a public use, it ceases to be private property. He, in effect, grants to the public an interest in such use and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use.”

Spring Valley Water Co. v. San Francisco, 165
Fed. 667-676;

Munn v. Illinois, 94 U. S. 113 (24 L. Ed. 77).

The latter case was referred to by the Supreme Court in a later decision, as follows:

“The principle was expressed to be, quoting Lord Chief Justice Hale, ‘that when private property is affected with a public interest, it ceases to be *juris privati* only,’ and it becomes ‘clothed with a public interest when used in a manner to make it of public consequence and affect the community

at large,' and so using it, the owner 'grants to the public an interest in that use and must submit to be controlled by the public for the common goods.' * * * It is the business that is the fundamental thing; property is but its instrument, *the means of rendering the service* which has become of public interest." (Italics ours.)

German Alliance Ins. Co. v. Lewis, 233 U. S. 389-409 (58 L. Ed. 1020).

See also:

Budd v. New York, 143 U. S. 517 (36 L. Ed. 247);

Brass v. North Dakota, 153 U. S. 391 (38 L. Ed. 757).

The language quoted above, and the case of *Munn v. Illinois* (*supra*) are referred to with approval by the California Supreme Court in

Contra Costa Water Co. v. Oakland, 159 Cal. 323, 333.

And in the same opinion (p. 334) the court states the rule, which is now firmly established by the decisions of the United States Supreme Court, viz.:

"It is now well settled that what one engaged in furnishing water to the public is entitled to demand is 'a fair return upon the reasonable value of the property at the time it is being used for the public' over and above its necessary operating expenses, including current repairs and taxes."

An appropriator of water for public use is but an instrumentality for the distribution of the water to such members of the public as might apply for them

and pay to him the legal charge for the service he had rendered.

Leavitt v. Lassen Irri. Co., 157 Cal. 85.

“It is true, as said in the Leavitt case, that the person in charge of the public use is a trustee in charge of a public trust, ‘the agent in the execution of this public trust’ and that he cannot lawfully burden this trust or the property devoted to and held for the purposes of the trust. And so he cannot convey it away absolutely to private use, or contract for a preference to one consumer to the detriment of others, etc.”

Southern Pac. Company v. Spring Valley Water Co., 159 Pac. (52 Cal. Dec. 273).

The Principle is Not Affected by the Method of Acquisition.

If acquired by purchase, inheritance or gift, a water system, when devoted to public use, “ceases to be *juris privati*,” it is thenceforth charged with the burden of supplying the public, and at *rates which are fixed by the public*.

There is no distinction between the acquisition of a pipe system and the acquisition of money which must be devoted to the installation of such a system.

The contributions in question here represent money *received* by the plaintiff, it is true, but the plaintiff is legally bound to devote said moneys to the acquisition of property in the form of service connections and water pipe, which property is impressed with a public burden, viz., that of supplying water to the public and to that purpose it must be perpetually devoted; its

only value then to the plaintiff is to enable the latter to earn an income by collecting rates from water consumers in the territory wherein the extensions and service connections are laid; otherwise, the plaintiff would be charged with the burdens of a trustee for the public benefit, entirely without any compensation in the way of revenue.

The situation may be further illustrated by assuming that the public owned a system of pipes already laid, and bestowed the same upon the plaintiff, but required the latter to obligate itself to use the same and supply water therewith unto the donors perpetually, its sole compensation being the rates to be collected for water furnished; such a donation, but for the water rates, which we concede to be revenue or income, would constitute a *burden* rather than a *gain* to the plaintiff; the plaintiff's income from rates is the sole advantage it can gain from such a donation; its interest in such a system, although called ownership, is merely usufructuary.

If A should donate to B a well, upon the condition that B should pump water therefrom for A's use and benefit and for no other purpose, it is manifest that B would not be benefited except by such wage as A agreed to pay him for his labor.

This argument is further emphasized when it is remembered that the donor (the public) asserts the right to establish the rates which the plaintiff is entitled to collect for performing the service.

Without such rates the plaintiff would be under a public burden and would receive *no revenue*, which is the best illustration of our contention that these con-

tributions are not gains or profits; the plaintiff has no income other than the moneys received by it for water supplied to consumers; out of this income all of its expenses must be paid and the residue, if any, is subject to distribution among its stockholders in the way of dividends; but no portion of its plant or system required for the performance of its public duties, least of all the service connections and pipe extensions for which these contributions are received, can be diverted to any other purpose or converted into money or other property; the pipes must remain where laid and must be kept in repair and supplied with water in order that the public may be served.

We submit that property so acquired and thus burdened should not be classified among gains, profits or income received by the plaintiff. Yet, the assessment complained of was based upon the conclusion of the commissioner that the mere receipt by the plaintiff of such moneys from the sources mentioned, constituted taxable income and that plaintiff was not entitled to any credit or deduction on account of the expenditure of said moneys in the creation of property in which the plaintiff's interest is no more than that of a public servant.

**Regarding these Contributions as Gifts Outright, they
are Not Taxable Income.**

Gifts have not been regarded as income within the meaning of income tax statutes and, under the present statute as we shall point out, are expressly excluded.

“The federal income tax law includes ‘the income from, but not the value of, property acquired by gift, bequest, devise or descent.’ But

aside from this specific exception and as the problem might arise under other taxing laws, the question whether an acquisition of the kind supposed would be taxable as income must depend upon the construction of the statutes. They contain terms broad enough to cover all such cases, as, where the act of Congress in force declares that the tax shall be laid on 'the entire net income received from all sources,' and upon 'gains or profits and income derived from any source whatever,' and the Wisconsin statute, after enumerating certain items, taxes 'all other income of any kind derived from any source whatever.' If these expressions are to be construed as effective to the full extent of the language employed, they would undoubtedly include gifts, winnings, and pecuniary awards or prizes. But if, following the rule of statutory construction, the generality of these expressions is to be restricted by a comparison with the more specific terms used in the context, then they would include only gains or income from sources similar to, or comparable with those already enumerated, such as salaries, professional earnings, mercantile business, invested capital, and so on. Following the analogy of the English cases cited, it seems that such acquisitions as those we have instanced would not be regarded as income."

Black on Income Taxes, sec. 38, pp. 88-89.

The same author calls attention to the fact that the present statute (of 1913) contains the following express provision, viz., that the net income of a taxable person shall include

"gains or profits and income derived from *any source* whatever, including *the income from, but*

not the value of, property acquired by gift, bequest, devise or descent." (Italics ours.)

Black on Income Taxes, p. 267.

The language above quoted, which includes the income from, but not the value of, property thus acquired, is significant, and in our opinion has a direct application to the question we are considering. The rates collected by the plaintiff from consumers of water on the portion of its system purchased and paid for with the contributions aforesaid, are undoubtedly a part of its income and the same are included in its statement of revenue for the year 1912 and 1913, on which it has paid the income tax required by the statute.

The Act of 1909, it is true, did not contain language specifically exempting gifts but, as stated by Mr. Black in the foregoing quotation, other income tax statutes containing no such specific words of exemption, have been construed in England and in the United States as not including gifts in the definition of gains, profits, income, or "income derived from any source whatever"; yet those words are surely as comprehensive, if not more so, than those used in the Act of 1909, which imposes the tax upon "*the entire net income* over and above five thousand dollars received

* * * *from all sources,"* etc.

We submit that the words "net income" would not include the contributions involved in this action, even if considered as gifts.

III.

**CONSIDERED FROM THE RATE-FIXING STAND-
POINT.**

The status of such contributions has been the subject of much controversy before rate-fixing bodies in determining whether or not such contributions should be included in the water company's income as gains or profits, thus enabling the rate-fixing body to establish lower rates than would be otherwise possible.

The same controversy has been carried into the courts on appeal from the decisions of the rate-fixing bodies, the water companies contending that such contributions are not income and that the rates fixed should be high enough to permit a reasonable return on the value of their plants, exclusive of such contributions. They argue that such contributions cannot be distributed among stockholders or used to defray current expenses or in any way treated as revenue; that money so received is in no respect different from contributions in the form of pipes already laid and voluntarily turned over by the owners thereof upon the condition that the water company shall accept the same and supply water to consumers who can be supplied therefrom; the effect of such contributions whether in money or in pipes already laid, is to increase the plant, system and property of the water company, but not its income or revenue, except so far as it is enabled to collect rates from such consumers.

Therefore, all property so acquired should be added to the water company's investment and included in

the value of the property upon which it is entitled to earn a fair and reasonable income, but nothing more.

If such contributions are to be regarded as income and the water company's rates fixed accordingly, the following absurd situation might result, viz.:

Whenever, in a given year, the value of the property so acquired equals the water company's expenses and an amount sufficient to pay a reasonable dividend on the value of its plant, *no water rates* should be allowed for that year, because the water company's income is already sufficient by reason of the so-called donations, and it must supply its consumers for nothing!

The situation we have assumed is not beyond the bounds of possibility and there have been years in the plaintiff's history (previous to the passage of the excise tax statute) when such contributions in the form of pipes, or money, have reached a sum nearly equal to its required revenue for the year.

If regarded as income and the plaintiff's rates fixed accordingly, *no rates* would be allowed and the plaintiff would be required to supply water gratuitously, because the contributions from the sources mentioned were more than enough to pay the plaintiff's expenses and a reasonable return on its capital. Accordingly, the plaintiff would be required to obtain elsewhere the money necessary to pay its operating expenses, taxes, interest, etc., and go without any profits on its entire investment by reason of its having accepted such contributions!

Considered as Additions to the Plant.

Confronted by these absurdities, some of the advocates of lower rates have taken the position that such contributions are not to be regarded as *income*, but that the same should not be included in the value of the water company's plant upon which it is entitled to earn a fair return, the argument being that as the water company did not pay for the increase of its system, it should not be allowed interest thereon.

The latter doctrine has not up to this writing been countenanced so far as it is sought to be applied to bonus pipes, although there is a leaning in that direction on the part of the Wisconsin Railroad Commission. As applied to service connections, thus acquired, the railroad commission of California has rendered a decision holding that meters and services paid for by consumers are not proper elements to be allowed for rate-making purposes, and should be excluded from plant value in fixing rates.

City of Eagle Rock v. Eagle Rock Water Co.,
vol. 3, C. R. C. 1054.

This decision has since been referred to with approval by the California Railroad Commission in an opinion rendered in the Matter of the Application of the San Gabriel Valley Water Company to fix and increase rates, etc. Vol. 8 C. R. C. 481.

In the latter case Commissioner Devlin drew a distinction between meters and services paid for by consumers and the so-called bonus pipes paid for by real estate companies and others engaged in the exploitation and sale of property (as in the present case).

It was contended that all donated pipe should be excluded as an element of value for the purpose of this proceeding, the same amounting in value to \$64,459. The conclusion of the commissioner was that the services and meters paid for by consumers should be excluded from plant valuation and, as to the so-called bonus pipes the language of the decision is as follows:

“Although these pipes were expressly donated to the company, they are now the property of the water company and, as such the company is entitled to a return on their fair value. On the other hand, the use value is not measured by an estimate of cost, for there are a number of these pipe lines that have only one consumer for a large investment, and it is obviously unfair to permit it to become a burden upon the remainder of the system.”

Pursuant to the above reasoning, the value of the bonus pipes was not fixed with reference to the *cost* thereof, but with reference to their earning capacity in the way of rates.

Applying this Reasoning to the Case at Bar.

If the water company is not allowed to include in its plant valuation the services paid for by consumers, it is obvious that such services, or the moneys contributed therefor, cannot be regarded as *income, gains or profits*; in fact, from the opinion of Commissioner Devlin, to which we have referred, it is apparent that the state railroad commission regards such services as the *property of the consumer*, as will appear from the following language:

“From the evidence it appears that the intention of the parties interested was that the sum paid by the consumer was for the service connection, that is, the consumer purchased the service connection, but because he has no franchise, he cannot maintain property of this nature in the streets. That the consumer cannot so use his property is no reason why the title automatically passes to the water company and later adds to the burden on that same consumer, in an appraisal for rate-making purposes.”

If the services paid for by the consumers *belong to the consumers*, it is obvious that the water company merely expended the money contributed by the owner in installing the service connection and acquired no title therein or to the money thus expended—except, as we have already said, the right of an usufruct. Again we submit that money or property having such a status cannot be regarded as income, gains or profits and should not be subjected to the payment of income taxes.

The same principle applies to the bonus pipes, although it appears that the railroad commission considers them as properly included in plant valuation for rate-fixing purposes.

It will be observed that they are not so included upon the basis of *cost*, but merely in proportion to their earning capacity, that is to say, according to the number of consumers who are supplied by such pipes. This clearly indicates that the rates, *and the rates alone*, are the basis of the water company's income and the bonus pipes cannot be considered in determin-

ing the amount of its income. In the case at bar the amount received by the plaintiff in the year 1912, in the way of contributions for bonus pipes was \$52,895.65, and in 1913 the plaintiff received from the same source \$32,785.69; under the internal revenue commissioner's ruling, both these sums are included in the plaintiff's income and no deduction is allowed by reason of the water company's having expended, of the moneys so received (and in the construction of so-called bonus pipes) the sum of \$51,235.12 in 1912, and the sum of \$20,927.03 in 1913. Thus, the plaintiff is charged with having received an income equal to the actual *cost* of the bonus pipes when the valuation placed thereon for rate-fixing purposes might not equal one-tenth of the cost, depending upon the sparsely settled condition of the territory into which such bonus pipes were laid.

It seems manifest that the plaintiff should not be charged with such property (if at all) at any amount exceeding its value for rate-fixing purposes, which amount does not appear and cannot be made to appear in its income tax return since it is necessarily an estimated value based upon the earning capacity of such pipe and depending upon the number of consumers, quantity of water supplied, etc.

In Wisconsin the railroad commission has ruled that neither service connections nor bonus pipes (referred to as "private mains") should be included in plant valuation for rate-fixing purposes.

We quote from its opinion as follows:

“It appears to be clearly established that the charge assessed against the consumers by the company, for the installation of services, has been in the aggregate sufficient to cover the cost of this work to the company. In view of these facts we are of the opinion that the value represented in the services under consideration, and for which the consumers have paid, is not a fair element in the valuation for the purposes of this case. This applies also to the value of the so-called private mains, to the amount which the consumers have paid, and have not been reimbursed by the company.”

City of Beloit v. Beloit Water, Gas and Electric Co., 7 W. R. C. R. 187, decided July 19th, 1911.

Other rulings which include services and bonus pipes in plant valuation for rate-fixing purposes, are equally oppressive to the water company, by reducing its required revenue to the extent of the contributions so received.

The plaintiff in this action, seeking to restrain rates fixed by the Los Angeles city council as being confiscatory, has in two separate cases failed to obtain the injunction sought, because of rulings by the Superior Court, holding that the water company's required income for the ensuing year should be *diminished* to the extent of its receipts for the preceding year from such contributions, or at least, by such an amount thereof as would equal the deficit between its actual receipts from rates and the required income.

This is in effect a holding that the water company *must pay* for the service connections and bonus pipes and will be compelled to do so by the action of the rate-fixing body in diminishing its required income to the extent of the property so acquired.

The following conclusions must result:

(a) If the water company is not entitled to include such contributions in its plant value for rate-fixing purposes, they cannot be regarded as income in any sense of the word, for they produce no rates and are an added responsibility without any compensation.

(b) If the water company is obliged to *pay for* the service connections and bonus pipes by having the cost thereof deducted from its required revenue, the same cannot be regarded as income any more than other property *purchased* by the water company and added to its plant.

Whichever theory is adopted, the result is that property thus acquired cannot be regarded as gain, profit or income.

It is manifestly unjust and improper to force upon the water company the additional burden of paying an income tax upon such property.

Reverting to Our Opening Argument. (See Paragraphs I and II of this Brief.)

We do not concede that such contributions can be considered a part of the plaintiff's taxable income within the meaning of the income tax statute, even though they, or the pipes paid for therewith, may be allow-

able (on some basis of valuation) as a part of the plaintiff's plant for rate-fixing purposes.

We rely with confidence upon our first position that contributions to the plant of a public utility company, even considered as donations, are not taxable income; that the same are neither more nor less than semi-public property with which the plaintiff is entrusted by the donors (the public) to be operated for their use and benefit, for which services they agree to pay the plaintiff in rates—which rates they reserve the right to fix.

We request a reversal of the judgment.

Respectfully submitted,

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Attorneys for Plaintiff.

No. 2837.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Union Hollywood Water Com-
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Plaintiff in Error,

vs.

John P. Carter. Collector of the
United States Internal Revenue
for the Sixth District of the
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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Filed

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BRIEF OF DEFENDANT IN ERROR.

The plaintiff in this action claims by his complaint a refund of income taxes exacted by the internal revenue collector of the district and paid by the plaintiff on the sum of thirty-three thousand twenty-four dollars and fifty cents for moneys received for making service connections to plaintiff's water plant in the year 1912, and on the sum of fifty-two thousand eight hundred ninety-five dollars and sixty-five cents in that year received

by the plaintiff from property owners by reason of the plaintiff having extended its mains into the property of the payers of said amount.

The Act of August 5, 1909, section 38, provides for a tax on the net income of certain corporations.

“* * * such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties * * *; (second) all losses actually sustained within the year and not compensated by insurance or otherwise * * *; (third) interest actually paid within the year on its bonded or other indebtedness to an amount * * *; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof * * *; (fifth) all amounts received by it within the year as dividends upon the stock of other corporations * * *”;

The act also provides that on or before the first day of March, 1910, and the first day of March in each year thereafter, a true return, under oath or affirmation, shall be made by each of the corporations, which returns shall show:

“* * * (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or asso-

ciation, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds;

and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed, under the authority of the

United States or any state or territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue."

It would seem quite clear that the corporation in its return is required by law to show the total expense of labor, maintenance, repairs, etc., for each year, and of course those expenses would include whatever labor and materials were necessary for the making of service connections for the year, which amount should certainly be deducted from the entire gross income and a part of the gross income was the receipts for the service connections. and therefore the tax levied and collected upon the first above amount of receipts came within the provision of the statute.

As to the receipts from property owners above mentioned, for extensions into their property, it seems clear that these are a part of the gross income of the corporation for the year. The extensions were permanent improvements and not current expenses incurred in keeping the installed plant in repair, and clearly, under the act referred to, any part of the income of the corporation invested in permanent extensions of the plant are not exempt from the income tax.

Connecticut Mutual Life Insurance Company v.
Eaton, 218 Fed. 187 (see page 222).

While the foregoing case does not specifically state that any part of the income of a corporation invested in extensions is not exempt from the tax, yet the discussion on page 222 of the report as to the exemption of an amount expended by the plaintiff in that case for office repairs shows clearly that if that amount had been expended in the acquirement of new properties or extensions the amount would not have been exempt from the tax.

The tax imposed upon corporate franchise by the Tariff Act of 1909 is not an income tax, but is an excess tax upon the privilege of doing business by the corporation, which tax is measured by the income received from all sources by the corporation.

Flint v. Stone-Tracy Company, 107 U. S. 220;
Stratton's Independence v. Howbert, 231 U. S.
399.

The bases of rate fixed by the various commissions of the various states, it would seem, is not in any sense the measure of the tax to be paid by corporations subject to the tax under the Act of 1909. It seems that the Supreme Court of the United States fully answered all of the arguments of counsel for the plaintiff in this case, as follows:

“As to what should be deemed ‘income’ within the meaning of Sec. 38, it of course need not be such an income as would have been taxable as such, for at that time (the Sixteenth Amendment not having been as yet ratified) income was not taxable as such by Congress without apportionment according to population, and this tax was not so apportioned. Evidently Congress adopted

the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the government. In *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 165, it was held that Congress in exercising the right to tax a legitimate subject of taxation as a franchise or privilege, was not debarred by the Constitution from measuring the taxation by the total income, although derived in part from property which, considered by itself, was not taxable. It was reasonable that Congress should fix upon gross income, *without distinction as to source* (or hours) as a convenient and sufficiently accurate index of the importance of the business transacted. And from this point of view, it makes little difference that the income may arise from a business that theoretically or practically involves a wasting of capital.

“Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice. The act prescribed that the tax should be ‘equivalent to one per centum upon the entire net income over and above \$5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations,’ etc., or, with respect to foreign corporations, ‘upon the amount of net income over and above \$5,000 received by it from business transacted and capital invested within the United States,’ etc. And the net income was to be ascertained by taking, first, the ‘gross amount

of the income of such corporation * * * received within the year from all sources,' or, in the case of foreign corporations, 'from business transacted and capital invested within,' etc. And the return was to be made under oath by the president and treasurer, or other officer having like duties, indicating in the clearest manner that it was to set forth *data* that with proper accounting would appear upon the books of the corporation. We have no difficulty, therefore, in concluding that the proceeds of ores mined by a corporation from its own premises are to be taken as a part of the gross income of such corporation. Congress no doubt contemplated that such corporations, amongst others, were doing business with a wasting capital, and for such wastage they made due provision in declaring that from the gross income there should be deducted (*inter alia*) 'all losses actually sustained within the year,' including 'a reasonable allowance for depreciation of property, if any,' etc."

Stratton's Independence v. Howbert, 231 U. S. 416-18.

No doubt by reason of the rigidity of the Act of 1909 the Tariff Act of 1913 provided for an allowance in the case of mining corporations as follows:

"And in the case of mines a reasonable allowance for depletion with ores and all other natural deposits and not to exceed five per centum of the gross value at the mine of the output for the year for which the computation is made."

Federal Statutes, Annotated, Supplement of 1914, page 192.

It is respectfully submitted that the complaint in this action shows that the moneys collected by the internal revenue collector, which the plaintiff now seeks to recover, were properly assessed against the income of the corporation.

Respectfully submitted,
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